Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ALVY T. MCQUEEN
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IRC Section 6103(a)[1] prohibits the IRS from disclosing return information to anyone outside the IRS. Section 6103(d) allows the IRS to share tax return information with a state tax agency if (1) an authorized official of the state tax agency makes a written request for the information; and (2) the written request specifies the state tax agency representatives authorized to receive the information.

The question presented is whether the disclosures are authorized under Section 6103(d) where (1) the state tax agents, without authority, made oral requests only; and (2) IRS Agents, without authority, disclosed return information to state tax agents who were not designated in any writing by name, position or any other characterization as state tax agency representatives authorized to receive return information?

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[1] All Section references herein are to the Internal Revenue Code of 1986 (26 U.S.C.), unless otherwise specifically noted.

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UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Alvy T. McQueen, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for Fifth Circuit in this case.

OPINIONS BELOW

The Court of Appeals summarily affirmed without opinion under its Local Rule 47.6. That summary affirmance is not reported but is reproduced at App. 1 - 2.[2] The district court's opinion granting summary judgment is reported at 5 F. Supp. 2d 473 and is reproduced at App. 7 - 38.

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[2] References to "App." are to the separately paginated appendix at the end of this petition.

JURISDICTION

The court of appeals entered judgment on March 4, 1999 (App.3-4) and, on March 26, 1999, denied a timely filed petition for rehearing (App. 5-6). The jurisdiction of this Court is invoked under 28 U.S.C , § 1254(1).

STATUTE INVOLVED

Internal Revenue Code of 1986 (26 U.S.C.):

Section 6103. Confidentiality and disclosure of returns and return information

(d) Disclosure to State tax officials and State and local law enforcement agencies

> (1) In general. Returns and return information with respect to taxes imposed by chapters 1, 2, 6, 11, 12, 21, 23, 24, 31, 32, 44, 51, and 52 and subchapter D of chapter 36 shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund. Such inspection shall be permitted, or such disclosure made, only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such writter. request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. * * * *.

STATEMENT

In 1976, Congress substantially revised Section 6103 to preserve the integrity of the voluntary tax system by assuring citizens that their information gathered by the IRS will not be disclosed to anyone, including other government agencies, except in specifically authorized circumstances. Section 1202 of the Tax Reform Act of 1976 (Pub. L. 94-455, 90 Stat. 1667). Section 6103 contains certain circumstances where Congress authorizes disclosures to other federal government agencies and to certain state agencies, here state tax agencies (Section 6103(d)).

By 1988, the IRS had entered agreements under Section 6103(d) with the Comptroller of Public Accounts for the State of Texas ("Comptroller"). Those agreements are (1) an Agreement on Coordination of Tax Administration ("Coordination Agreement", reproduced at App. 39-51) and (2) an Implementation of Agreement on Coordination of Tax Administration between the Comptroller and IRS ("Implementation Agreement," reproduced at App. 52-63). D's S/J Exhs. titled Eastman Decl., Exhs. A and B, and P's S/J Exhibits 22 & 23.[3] These agreements are jointly referred to as the "Agreements."

By 1988, the United States through several of its agencies (the United States Attorneys office, the FBI and the IRS) and the Comptroller of Public Accounts for the State of Texas were conducting industry-wide investigations of motor fuels tax evasion in and around Houston, Texas. (P's S/J Exh. 18; see also P's S/J Exh. 8.) The federal investigations consisted of both IRS administrative investigations and grand jury investigations, as well as FBI tax investigations, coordinating through a task force. (Id.) At least one Comptroller agent assisted these investigations from time to time. (P's S/J Exh. 20.) The same IRS personnel (Susie M. Wong and Mark W.

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[3] We shall refer to the summary judgment record below as P's S/J Exh. ___, when referring to Plaintiff's Summary Judgment Exhibits and D's S/J Exh. ___, when referring to the Defendants' Summary Judgment Exhibits. The trial level docket entries for those exhibits are as follows: P's S/J Exhs. are Docket Entries 119 & 164; D's S/J Exhs. are Docket Entry 160.

Hughes, jointly referred to as the "IRS Agents") participated in the IRS administrative investigations and in the grand jury investigations. Nancy K. Pecht (now Johnson, but referred to herein as "Pecht" which was her name at all times here pertinent) was then an AUSA serving as prosecutor for the grand jury investigations. (P's S/J Exh. 18.)[4]

Petitioner was in the motor fuels distribution business and was targeted for investigation in early 1988. (P's S/J Exh. 19.) The contested fact issue in the litigation below was whether the investigation of petitioner by the task force (including the IRS and FBI) was, by June 18, 1988, a grand jury investigation or solely an IRS administrative investigation. The district court resolved that issue by finding that petitioner was solely a target of an IRS administrative investigation at all times pertinent to the only issue raised in this petition. Petitioner does not contest that finding, and assumes that the United States does not either, since the district court made the finding at the request of the individual defendants who were represented by the Department of Justice ("DOJ").[5]

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[4] Pecht is now and has been throughout this litigation a federal Magistrate Judge.

[5] Unacknowledged by the district court in making that key finding, however, are some serious problems, one of which we address here solely to address the role of the FBI in a tax investigation. The FBI was participating in a joint fuels tax fraud task force with the IRS (see some of the joint activity chronicled at App. 15 n. 6), and the FBI had opened a tax investigation of petitioner for tax fraud by early 1988 and assigned agents to the investigation. The FBI, however, has no authority to investigate tax crimes. Webster, William H. Review of the IRS's Criminal Investigation Division (released April 1999) ("the Webster Report"), Executive Summary, p. 1 and Text of the Report, p. 3 (IRS CID is "the only federal law enforcement agency with the authority to investigate criminal tax violations.") The FBI could not participate in an IRS administrative investigation without serious problems under Section 6103. Therefore, the FBI can participate in a tax fraud investigation only through a grand jury investigation in which FBI agents are assigned as assistants to the grand jury. The district court granted the individual defendants summary judgment on this fact issue, holding that petitioner had not been a target of a grand jury investigation prior to June 18, 1988, a date after the FBI had already targeted him in the tax investigation. If the district court's holding on that issue is correct, the FBI's investigation of petitioner for tax fraud was quite illegal and the FBI's participation in a joint task force to pursue administrative investigations is also quite illegal.

On June 18, 1988, the IRS Agents obtained and executed a search warrant, seizing documents belonging to petitioner. The documents were, in the IRS's hands, "return information" subject to the requirements of Section 6103, disclosable to state tax agencies only as authorized under Section 6103(d).

Shortly after the documents were seized by the IRS agents, Comptroller agents investigating petitioner's state tax liabilities learned that the IRS Agents possessed the documents and **orally** requested that the IRS Agents disclose the documents to them. (We say that it was an oral request because, in discovery and on the summary judgment record, the United States never produced a written request or even alleged that one existed.) Beginning on September 20, 1988, in response to that request, the IRS Agents disclosed the documents to Comptroller Agent Michael McKenzie (and perhaps also to Randy Wilson and one other agent during the process). (D's S/J Exh. 40, interview of McKenzie, dated 4/18/91.) The following points regarding those disclosures are uncontested on the summary judgment record:

1. The Comptroller's agents were not named in the Agreements, either by name or position, as being authorized to make a request for or receive return information. The Coordination Agreement (¶ 2.5) requires that authorized Comptroller representatives be "named in writing". Neither in the discovery nor on the summary judgment record did the United States produce any such "writing" but instead maintained that the Coordination Agreement was the "writing" despite the fact that it, on its face, requires a separate writing.

2. Upon receipt of the request, the IRS Agents did not seek advice from the IRS District Counsel or the IRS Disclosure Office, the only two offices authorized to advise IRS personnel as to whether they should make the disclosures of return information, nor did the IRS Agents review the Internal Revenue Manual ("IRM") or the Agreements with the Comptroller.

3. The IRS Agents instead sought informal advice from Pecht, an AUSA. In part relevant to Section 6103(d), Pecht advised

them that, "in her opinion," the disclosures could be made to the Comptroller agents. The factual basis for that opinion was a representation to Pecht by Wong that there was an agreement with the Comptroller "concerning the exchange of this type of information" (Pecht Declaration, ¶ 12, p. 5.) The legal basis was Pecht's review of Section 6103(d). Id. In her deposition testimony judicially supervised by the district court (and thus known to the court and referenced in the order granting Defendants summary judgment), Pecht testified that she did not read the Agreements, and was not even aware that Section 6103(d) required a written request. (Pecht Dep. P. 58, included in the record below at Doc. 195.) And Hughes testified that he does not recall that he had read the agreements. (Hughes Dep. 17.) The district court refused to allow Wong's deposition, and the Government left the summary judgment record silent on the issue of the state of her knowledge about the requirements of the Agreements. We think, however, the Court can assume that she had no specific knowledge of them, for the adventure she was about to undertake was clearly not allowed by the Agreements.

4. The IRS Disclosure Office was not contemporaneously aware of the request or the disclosures and did not become aware of them until this matter surfaced in 1989. The IRS Disclosure Office therefore could not make contemporaneous records of the disclosures as required by Section 6103(p). (P's S/J Exhibit 47, Daily Interview dated 1/25/91.) Although it is not expressly stated in the record, it is a matter of irrefutable logic that the Disclosure Office cannot account for a request or a disclosure it does not know about.

After learning of the disclosures in a proceeding involving the Comptroller in 1989, Petitioner commenced this suit in 1991. The complaint asserted a Rule 6(e) claim, seeking contempt against the individuals (the AUSA and the IRS Agents) for disclosing grand jury matters in violation of the grand jury secrecy rule. Alternatively, the complaint asserted a Section 6103 claim against the United States on the ground that, if the documents were obtained by the IRS only in an administrative investigation, the disclosures violated Section 6103(d). The Section 6103(d) claim sought damages (minimum damages being

$1,000 per act of wrongful disclosure). Jurisdiction for the Section 6103 alternative that is in issue on this petition was conferred by 28 U.S.C., Section 1340 and IRC Section 7431.

After the United States asserted the defense in 1991 that Section 6103(d) permitted the disclosures, the IRS completed an internal investigation of the disclosures. In that internal investigation, the IRS Disclosure Officer, Judy Daily, advised that:

> DAILY stated, in her professional opinion, the IRS should have not released any information to the Office of State Comptroller's Office, State of Texas. DAILY said the request should have made through her office, and the authorized release would have been made through the terms of the agreement the IRS has with the State of Texas.

(P's S/J Exh. 47, Interview of Daily, included at App. 64-66). Based on its exhaustive investigation and advice from the Office of Assistant Chief Counsel (Disclosure Litigation), the IRS concluded that "Special Agents Hughes and Wong did, in fact, make unauthorized disclosures to the Comptroller of Public Accounts of the State of Texas." (P's S/J Exh. 40, containing (1) letter of July 25, 1991 to United States Attorney from IRS Regional Inspector and (2) letter of February 8, 1992 to the Assistant Attorney General for the Criminal Division from the IRS Chief Inspector, reproduced App. 67-71.)

The National Office of the IRS, upon advice of the Assistant Chief Counsel (Disclosure Litigation), concluded that the IRS Agents should not be criminally prosecuted under Section 7213 for the Section 6103 violation because the Agents had relied upon the advice of the AUSA and thus had not acted willfully, an element of the Section 7213 felony in addition to a Section 6103 violation. (Id., Letter of February 8, 1992 to the AAG for the Criminal Division from the Chief Inspector for the IRS.)

The United States nevertheless continued to assert below that there was no Section 6103 violation on the ground that the Coordination Agreement satisfied all requirements of Section 6103(d).

Without even acknowledging the IRS's investigation and conclusions (made part of the summary judgment record), the district court accepted the United States' defense whole on motion for summary judgment. In part here relevant,[6] the district court reasoned that the Coordination Agreement with the Comptroller alone was the written

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[6] Not relevant to any issue is the district court's "kill the messenger" approach to resolving the serious issues before it, involving potentially serious misdeeds by a Magistrate Judge. Petitioners' position on the Section 6103 issue was the same as the IRS's own conclusions, hardly abusive. Petitioner's alternative Rule 6(e) claim turned upon whether the investigation of petitioner implicated a grand jury investigation or was solely an administrative investigation at the time the search warrant was executed on June 18, 1988. The district court found that the investigation was solely administrative, thus finding petitioner's position abusive. Yet, the district court ignored the contemporaneous record evidence to the contrary, including a contemporaneous IRS statement that "the IRS is not investigating [petitioner] administratively either civilly or criminally." (P's S/J Exh. 32, letter of 8/8/88 to the United States Attorney from the IRS Deputy Regional Counsel.) The district court further ignored the document formally assigning Hughes to the McQueen investigation on June 17, 1988 stating that the investigation was part of a "task force," including the FBI and AUSA (D's S/J Exh. 47, Form 3714, Case Analysis Guide. The FBI and AUSA cannot participate in an administrative investigation, and can only participate through a tax grand jury investigation. See Webster Report, supra, p. 4 n. 5. The district court instead resolved the case on summary judgment based only on the self-serving statements of the defendants seeking to avoid Rule 6(e) contempt exposure. The district court further failed to note that, concerned that there had been a Rule 6(e) violation, the United States Attorney upon inquiry from the IRS referred the matter to the DOJ Criminal Section's Public Integrity Section ("Public Integrity"). Public Integrity was then sufficiently concerned that it opened an investigation, including authorizing a new grand jury investigation, into whether the individuals, including one now a federal Magistrate Judge, had violated Rule 6(e). (See P's S/J Exh. 47, interview of David Ring.) Public Integrity then suspended the investigation, without resolving it on the merits, for reasons the Government chose not to explain. In all events, however, the alternative claims in this case were serious enough to justify a dispassionate resolution of the issues. Petitioner is concerned that the district court's kill the messenger approach obscured the Court of Appeals' vision of the merits of this case (which, if true, means that a district court prevented effective appeal simply by killing the messenger), and urge this Court not to let its judgment and jurisdiction be influenced by that approach.

request sufficient to designate the Comptroller's agents to whom the disclosure was made here. The Court's reasoning for the latter holding is obtuse but it seems to have found that the authority to disclose to "Agency Representatives" was sufficient. The district court, however, failed to note the specific definition of "Agency Representative" requiring a separate writing naming the representatives authorized to receive disclosure.

After oral argument in the case, the Court of Appeals summarily affirmed on the basis of its Local Rule 47.6. The Court of Appeals did not state which of the five bases for affirmance in that Local Rule applied. Although that affirmance is not necessarily an adoption of or agreement with the district court's rationale except as to result, the United States did not assert any alternative justification on appeal. The district court opinion is thus the only articulation of any basis for the summary judgment on the issue presented here. We shall therefore treat it as the operative opinion.[7]

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[7] Summary nonprecedential dispositions are controversial because in Judge Posner's words, they are "a sort of formula for irresponsibility," implicit in the fact that the panel is not willing, or perhaps able, to articulate a rationale or commit the court of appeals to a precedent and be bound in a future case just as they bind the parties in the case at hand. More importantly, for present purposes such summary dispositions can make a case otherwise worthy for Supreme Court review a less attractive candidate. See Glaberson, Caseload Forcing Two Level System for U.S. Appeals, New York Times (March 14, 1999). This concern suggests that a court of appeals can influence this Court's jurisdiction by summary disposition without rationale. That is, we submit, inappropriate systemically and in this case where the appellant's rights to a principled resolution of the case on appeal may have been compromised. If the panel had affirmed by adopting the district court's analysis, which it did not do (certainly, we think, because it knew the analysis was suspect and inappropriate for binding effect upon anyone other than this petitioner), the system could indulge the assumption that the panel had a reason it could articulate and did articulate by adopting the district court's reasoning. Instead, the panel said, in effect, that, for reasons it would or could not articulate, appellant here was not entitled to any relief. Such dispositions, although suspect, do not make a case worthy of this Court's review, but by the same token they should not make a case less worthy for this Court's review.

REASONS FOR GRANTING THE WRIT

The Issue

The issue presented is whether the Comptroller made a "written request" for the information disclosed to his agents and, if so, whether that "written request" named the persons to whom the disclosure was made. The district court held that the Coordination Agreement (App. 39-51) **alone** met both of these requirements. We urge below that those holdings are highly questionable and, indeed, certainly wrong. The reason is simply stated. The Coordination Agreement is not the "written request" Congress mandated in Section 6103, but even if it could possibly be stretched to be the written request it certainly does not name the individuals to whom disclosure was made here, whether by name, position, title, status or any other identifying characteristic. We realize that doubt as to the correctness -- or even clear error -- of the opinions below is not alone a basis for this Court's granting certiorari, because the system must tolerate some room for error and questionable opinions even if that means that justice is denied in a particular case. Accordingly, we rest our petition also on the importance of the issue and conflict, at least in principle, with the leading case.

Background for Section 6103

Section 6103 was substantially revised in 1976 because of Congress' concerns arising from disclosures during the Watergate era that some government agencies (specifically there the office of the president and the DOJ) had too free access to return information and would use that information and IRS processes (audits and investigations) to strike back at persons they viewed as enemies. Tax Analysts v. IRS, 117 F.3d 607, 611 (D.C. Cir., 1997). Congress viewed these and related instances where the IRS was the "lending library" for other Government agencies as being inconsistent with the imperative that taxpayers be encouraged to comply and cooperate with the IRS to make the system work. Baskin v. United States, 135 F.3d 338, 340 (5th Cir. 1998). Congress mandated a default rule that the

IRS could make no disclosures of return information. Section 6103(a). Congress provided limited exceptions where it determined that an agency's need overrode the need for the default rule, but only where procedural safeguards are satisfied to insure the integrity of the information for the authorized use.

Congress felt that the default rule and limited exceptions were so important to the system that it provided felony criminal sanctions for violations of the rules (Section 7213) and a civil remedy to the taxpayer whose information is wrongfully disclosed (Section 7431). A critical component of that civil remedy is the $1,000 per act of disclosure minimum damages that has been aptly described as follows (Scrimgeour v. United States, 149 F.2d 318, 327 n. 11 (4th Cir. 1998)):

> The $1,000 statutory damage award specified in I.R.C. § 7431(c)(1)(A), is included for the benefit of taxpayers. Actual damages for the invasion of privacy that occurs when tax returns are wrongfully disclosed can be hard to quantify. In order to encourage taxpayers to act as "private attorneys general" and pursue suits against the IRS for violations of I.R.C. § 6103, Congress enacted the statutory damages provision to ensure that in meritorious cases of wrongful release a taxpayer would not walk away from the courthouse empty-handed for failure of proving damages.

Plaintiff here seeks the minimum damages.

There is no dispute that return information was disclosed by the IRS Agents to the Comptroller Agents. The only question is whether those disclosures were pursuant to the Congressionally authorized exception in Section 6103(d). Authorized disclosures require the following conjunctive elements:

1. Disclosures may be made "for the purpose of, and only to the extent necessary in, the administration of such [state tax] laws."

2. Disclosures may be made "only upon written request by the head of such agency, body, or commission." ("Written Request Requirement.")

3. Disclosures may be made "only to the representatives of such agency * * * designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency * * * *. ("Authorized Personnel Requirement.")

Pervasiveness of the Written Request Requirement

The Written Request Requirement is the key procedural device to insure that return information disclosures are allowed for only the limited Congressionally approved purposes. The instances in which Congress employed this device for agencies to access return information are too numerous to discuss here,[8] but the following, in addition to Section 6103(d), are representative (references are to subsections of Section 6103):

(f)(1)-(3) Disclosures to Congressional committees;

(g)(1) & (2) Disclosures to the president and certain executive agencies; and

(h)(3)(B) Disclosures to the Department of Justice.

The Authorized Personnel Requirement

Section 6103(d) also requires that the personnel authorized to receive disclosures be identified in the written request. Not all of the other exceptions have this additional requirement, but, for example, the

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[8] Our computer search of Section 6103 on Tax Analysts One Disk Internal Revenue Code for the term "written request" or, its equivalent formulation, "request in writing" (searched by "request writing" /5), produced 55 "hits".

written request from DOJ must also name the individuals to whom disclosure is authorized. ((h)(3)(B).)

The Authorized Personnel Requirement is quite explicit that the authorized agency personnel be named in the written request. Obviously, the written request can name the individual explicitly (e.g., Regulations Section 301.6013(j)(1)-1(d)(3) ("designating by name and title")) or by reference only to the agency employee's title (e.g., Regulations Section 301.6103(l)(2)-3(b)(3)(ii) (request may designate "by title")). In all events, the Authorized Personnel Requirement mandates that there be some method of identifying the person by specific name, by title, by position or some other objective criteria; otherwise, Congress' purpose is nullified.

The Coordination Agreement provides the method for identifying in writing as follows (¶ 2.5, emphasis supplied):

> The term "Agency Representative" means an Agency officer or employee **designated in writing** by the head of the Agency, to the District Director(s) at Austin, Texas; Dallas, Texas; and Houston, Texas, and the Service Center Director at Austin, Texas, as an individual who is to inspect or receive Federal returns or Federal return information on behalf of the Agency as provided by section 6103(d) of the Code * * *.

Here, of course, the United States failed to produce any "writing" naming the Comptroller agents by name or position because it does not exist. Thus, the United States and the courts below relied exclusively on the Coordination Agreement to meet the Authorized Personnel Requirement.

Other Procedural Safeguards

Section 6103(p) also imposes accounting and safeguard requirements for disclosures to agencies. Among those requirements are that the IRS:

> shall maintain a permanent system of standardized records or accountings of all requests for inspection or disclosure of returns and return information (including the reasons for and dates of such requests) and of returns and return information inspected or disclosed under this section.

Section 6103(p)(3)(A). The IRS must report to the Joint Committee and to the public on the number of requests and disclosures pursuant to the requests. Section 6103(p)(3)(B) & (C). Furthermore, the agencies authorized to receive such information must establish "a permanent system of standardized records with respect to any request, the reason for such request, and the date of such request made by or of it and any disclosure of return or return information made by or to it" as well as other procedural safeguards imposed by the statute itself or required by the IRS to protect the integrity of Section 6103. For a discussion of these and other requirements, see IRS Publication 1075 supra. Compliance with these provisions is an express condition of the Coordination Agreement, ¶ 6.1.

As evident here from the Disclosure Officer Daily's determination that the disclosures should have been made through her office (App.64-66), there was no contemporaneous accounting for disclosures involved here simply because the Disclosure Office cannot account for disclosure it does not know about. Disclosures outside the Disclosure Office such as involved here constitute systemic failures to satisfy the Congressionally mandated recordkeeping and reporting requirements, and that is, of course, why the Agreements require disclosures and requests for disclosures to be channeled through the IRS Disclosure Office and the state agency disclosure office.

Moreover, these recordkeeping requirements speak directly to the issue of whether the procedural agreement with the state tax agency (or other governmental agency) could alone constitute the written request. If, for example, the Coordination Agreement were the "request" or "written request," then the only accounting required for the request would be accounting for the Coordination Agreement itself – a nonsensical interpretation of the requirements in Section 6103(p)(3)

that the IRS account for "all requests" and disclose annually to Congress and the public the "number" of the requests. Can the IRS be serious in urging and the district court in holding, in effect, that there were no requests made by the Comptroller in 1988 because the Coordination Agreement was entered in 1986?

Pervasiveness of the Problem

As we noted, Section 6103 contains many exceptions permitting disclosures of return information to government agencies upon written request, sometimes also requiring that the written request identify the individuals to whom disclosure is authorized. The United States should be able to give the Court some accounting for the number of disclosures that flow from the IRS to these agencies, because the law requires contemporaneous accounting for and reporting of the disclosures (when the IRS knows about them, of course). See Section 6103(p)(3), above. We would expect that there are millions and millions of disclosures per year. Despite this gargantuan number, it is rare, rare indeed that any taxpayer ever becomes aware any disclosure might be illegal. It is accordingly important that courts not shy away from imposing the congressionally mandated sanctions (specifically the damages authorized under Section 7431) when such problems are discovered, because that was the encouragement Congress intended to motivate the IRS to comply with Congress' mandate.

Doubt as to the Correctness of the Decision Below

We have noted above certain aspects of the fabric of Section 6103 that call into question the correctness of the decision below. Without doubt, for example, there was an off-the-books disclosure that short-circuited the mandate of Section 6103(p). This alone suggests that this Court should be quite concerned about off-the-books disclosures blessed by the district court below.

The question here is whether the Coordination Agreement was intended to be the written request naming the individuals to whom disclosure was to be made, as the district court held. The agreement is a contract. The parties' intent expressed in the contract, so long as

consistent with the statute, must govern. Here, there are two contracts – the Coordination Agreement and the Implementation Agreement, both intended to work together to meet Section 6103(d)'s mandates. The Implementation Agreement provides for certain disclosures on a continuing basis. For example, Estate Tax closing letters, pursuant to ¶ IIIA1. There is no provision for the IRS to supply fuels tax return information to the Comptroller on a continuing basis. Accordingly, if the Comptroller desires return information regarding fuels tax, the Comptroller's disclosure office must request it under ¶ IV, which expressly requires a separate written request, and does so in quite explicit language (par. IV. B., emphasis supplied):

> B. The [IRS] * * * will provide the Agency with copies as well as permit physical inspection of audit abstracts, reports, and Federal return information concerning individual taxpayers in response to specific written requests. Agency requests for access will specify the Agency's need and use for such Federal return information and will be accompanied or incorporated into a **written request** for the information signed by the Comptroller, Chief Clerk or designated agency disclosure officer. Access will be denied without the presentation of such signed authorization. * * * *.

See also IRM 1.3.32.6.1 ("This section also establishes a procedure for disclosing these returns and return information in a manner which complies with the need and use and written request requirements of IRC 6103(d)(1).")

To be sure, ¶ IV.A. allows the IRS Disclosure Office to make a limited disclosure to the Comptroller's "agency liaison official" under circumstances where the Comptroller is not aware of a potential understatement of state tax and thus does not have the information (including the taxpayer's identification) to make the written request.

> If, in the judgement of the Internal Revenue office liaison official, the Agency has a need and use of the

> return and/or return information, he/she shall provide the Agency liaison official sufficient information, including identifying information, to make a specific request for the return and/or return information * * * *.

Where, of course, as here, the Comptroller has the information needed to formulate the request, return information is disclosable only under ¶ IV.B -- i.e., by specific written request.

Consistent with Section 6103(d)'s mandate, the IRM states the specifics of a "proper written request" as follows (1.3.32.10(3)):

> (a) the name, signature, title, and office location of the authorized individual who is to inspect or receive the returns or return information,
> (b) the name and other identifying information of each person or entity whose return(s) or return information is to be disclosed and a description of the specific return(s) or information desired, including type of tax and taxable years, and
> (c) the purpose for which the information is being requested, including the specific reason the information is needed and how the agency intends to use the information.

Certainly, if the IRS viewed the Coordination Agreement entered prior to the Implementation Agreement as the all-encompassing "written request" it would have been nonsensical for it to provide in ¶ IV.B. of Implementation Agreement that a separate "written request" is required. So too, if the Coordination Agreement alone justified the disclosure, ¶ IV.A.'s limited disclosure in order to permit the Comptroller to make a written request for the information would be equally nonsensical. So too, it would be nonsensical fore the IRS to provide in the IRM that a separate written request is required. Indeed, in this specific regard, if the IRS intended the Coordination Agreement to satisfy the requirements of the statute, the IRS (the drafter of the Agreement and the agency charged with Section 6103(d)'s

implementation and interpretation) would certainly have not concluded that Section 6103(d) was violated in this case.

IRS Publication 1075, "Tax Information Security Guidelines for Federal, State and Local Agencies," deals with the details of the procedures required to protect the integrity of authorized disclosures and states the role of agreements with the agencies as follows: "Generally, these disclosures are made by the IRS in response to written requests signed by the head of the requesting agency. * * * * Besides written requests, the IRS may require formal agreements that specify, among other things, how the information will be protected." The word "besides" means "in addition, also" (The American Heritage Dictionary of the English Language, 3d Ed. 1992, p. 177), which in the context means that a written request in addition to the agreements is required. The agreements specify the many details required to implement the protections of Section 6103 and do not purport to supplant or constitute the written request mandate, particularly where as here they expressly require a written request.

Moreover, even if the Coordination Agreement could be stretched to be a written request, it certainly does not comply in this case with the Authorized Personnel Requirement, for the Comptroller Agents to whom disclosure was made are not identified in the Coordination Agreement in any way. See also IRM 1.3.32.10 (requiring that the state officer to receive disclosure must be "designated in writing by the head of the State tax agency to receive the type of tax data requested."

Finally, with regard to the merits, the IRS's interpretation is entitled to great weight under Chevron if there were any doubt about the legislative mandate Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Here, as noted, the Implementing Agreement requires a separate written request, a wholly nonsensical requirement if the IRS had intended the Coordination Agreement to be the written request. And, of course in this specific instance, the IRS fully investigated and determined that there was a Section 6103 violation here. Yet, not only did the courts below give no deference to the IRS's determinations, they wholly ignored them.

Conflict with Case Authority

The district court instead relied (App. 33-35) only upon Smith v. United States, 964 F2d 630 (7th Cir. 1992), cert. denied 506 U.S. 1067 (1993). In Smith, the IRS District Director ("District Director") became aware that the state tax liaison official authorized to receive disclosures under the agreement with the state had failed to file federal income tax returns. The District Director determined that these facts "reflected poorly on Smith's ability to carry out his liaison responsibilities" and that the information should be disclosed to the state tax agency along with a request that he be relieved of those liaison responsibilities.

The District Director "sought the advice of his district's disclosure officer and the district counsel on whether he could lawfully disclose the information regarding Smith." (p. 632.) Based upon their advice, the District Director disclosed the information to the Director of the state tax agency. Smith was terminated and sued for damages under Section 6103.

The Seventh Circuit framed the issue as follows (p. 633, emphasis supplied):

> Does the Agreement on Coordination, standing alone, fulfill the requirement of a written request under these circumstances? We conclude that it does, **but emphasize the limited scope of the holding, given that it depends in large part on the unusual facts presented here.**

The court reasoned that Section 5.2 of the Illinois Coordinating Agreement provided that the IRS and the state tax agency would routinely "exchange lists of persons who have failed to file tax returns," thus constituting a standing written request for certain categories of information such as disclosed there. (p. 634.) This was unequivocal authorization in the agreement itself for disclosure of the key information. With regard to the Authorized Personnel Requirement, the court felt that the general reference to "Agency Representative" was

sufficiently broad to cover the disclosure there to the head of the state tax agency and immediately noted that the head of the state tax agency to whom disclosure was made was indeed the signer of the agreement, so that his name certainly appeared in the agreement which the Court held to constitute the written request. (p. 634.)

There are key distinctions between Smith and this case.

First, in Smith, the Court noted that the agreement specifically by its language authorized regular disclosures of the fact that returns had not been filed, which the Court viewed as a standing written request. By contrast, **nothing** in either of the Agreements authorized disclosures of the type involved here, without a separate written request; the Implementation Agreement makes explicit that a separate written request is required.

Second, in Smith, the District Director sought advice from the only two offices authorized to provide advice -- the disclosure office and the office of District Counsel. Here, by contrast, the IRS Agents sought advice only from someone having no authority to give it and having no expertise to base any informal advice.

Third, in Smith, there was a legitimate reason, wholly consistent with Section 6103 that the normal procedures could not be followed; in stark contrast, here, as confirmed by the IRS Disclosure Officer Daily's interview and the IRS's own conclusions, there was no reason that the prescribed procedures could not be followed.

Fourth, in direct contrast to Smith, the disclosures here were not made to someone named in the Agreement. As the Smith Court was careful to note, the state tax director to whom disclosure was made was a signatory to the Coordination Agreement, thus was named specifically in the Agreement. By contrast, neither the Agreements nor any other document names the Comptroller agents involved here as persons authorized to receive disclosure. Unlike Smith, if these Comptroller agents were authorized by some written document, it was neither of the Agreements which clearly do not mention them by name, title, position or any other identifying characteristic. As noted above, the

Coordination Agreement here is quite explicit as to how the Authorized Personnel Requirement is met -- by a specific separate writing -- and that specific writing does not exist. Thus, unlike Smith, there is no written document that could arguably constitute the written request that also names the Comptroller personnel to whom disclosure was made here.

The only commonality between this case and Smith is that IRS employees disclosed return information to state tax agency employees. The Smith court, however, was careful to limit its holding, so that it rejected the notion that any disclosure by any IRS employee to any state tax agency employee was authorized by Section 6103(d) and the Agreements, and was careful to ground its holding on unique facts not present in this case. In short, Smith conflicts with the holding here.

The expansive reading of Smith is not only wrong on its face but raises serious issues as to the integrity of Section 6103. Section 6103 and the agreements with the various agencies (including state tax agencies) have elaborate procedures designed to insure the proper channeling of disclosures from the IRS disclosure office to the agency disclosure office, proper screening of the information, proper use by the state tax agency, and proper accounting for all disclosures. Section 6103(p). Where, as here, off the books disclosures are made by short-circuiting the respective agency disclosure offices, the safeguards cannot be implemented.

The district court also noted in a footnote that the Tenth Circuit adopted the reasoning in Long v. United States, 972 F. 2d 1174, 1179-80 (10th Cir. 1992). Long, too, is critically different. The disclosures there were from the IRS disclosure office to the state tax disclosure office, whereas the disclosures here totally short-circuited the requirement that all authorized disclosures be requested and made through the respective disclosure offices. Moreover, the Long court found that the disclosures were in specific accordance with the Implementation Agreement, which in combination with that states' Coordination Agreement, met the written request requirement. In contrast, in this case, the Implementation Agreement here expressly

requires a written request, and the district court neither attempted nor purported to hold otherwise.[9]

In short, we respectfully submit that the holding below conflicts in principle with the case authority upon which it relies and raises serious concerns as to the integrity of the provisions Congress enacted to limit return disclosures to specific and narrow circumstances.

Other Impacts on the Integrity of Section 6103

Congress imposed felony criminal penalties if a return information disclosure is willful. Section 7213. Here, as noted, the IRS considered the possibility of seeking such penalties against these Agents and, upon consultation of the Office of Chief Counsel (Disclosure Litigation), advised the Public Integrity Section that, because the agents relied upon Pecht in making the disclosures, their actions were not willful. The effect of the holding below is that criminal liability for Section 6103(d) violations is not available at all because there can be no Section 6103(d) violations. Any disclosure from any IRS employee to any Comptroller employee is pursuant to a written request – to wit, the Coordination Agreement (or its counterpart in other states). Indeed the holding is much broader – if the IRS has an agreement with other agencies (such as DOJ) who are subject to a Written Request and Authorized Personnel Requirements, disclosures by any IRS employee to any such agency employee is also OK. Thus, such employees who are golfing buddies can share information on the links or in other circumstances Congress plainly never intended without any concern whatsoever for any punishment therefor. We submit that that necessary conclusion from the holding below erodes and denies the will of Congress.

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[9] Taylor v. United States, 106 F.3d 1563 (8th Cir. 1997), a pro se case, urging a Section 6103 violation where the IRS disclosure officer may have orally given the state tax agency disclosure officer return information in order to permit the State tax agency disclosure officer to prepare the separate written request for the detailed information is, of course, a limited disclosure expressly permitted by the Implementation Agreement, ¶ 4A. Here, as noted above, that provision did not apply here.

Integrity of the Judicial System

We have noted above the certainty that the courts erred below in holding that the disclosure here complied with Section 6103(d). We have also noted (p. 8 , n. 6) that the courts' vision and resolution of this case may have been obscured by a kill the messenger mentality. We think that there is at least a serious possibility that that occurred because under either alternative position in the case below, a sitting federal magistrate judge would have been implicated in a serious violation of federal law. If there is even a remote chance that that happened, there should be some remedy in the system to assure that the case is decided fully, fairly and openly on the merits, without any bias or prejudice toward any party. The only remedy can come from the Supreme Court.

Efficient Use of Court's Resources

The question presented on this petition is purely legal. The relevant facts are few, simple and undisputed. IRS Agents having no authority to make disclosures of return information to the Comptroller received an oral request from Comptroller agents having no authority to make requests for return information. The Comptroller made no written request and there is no writing even remotely naming these Comptroller agents as persons authorized to receive disclsoures. Rather than seeking advice from the only offices authorized to provide them assistance or advice -- the IRS Disclosure Office and the IRS District Counsel -- which offices would have prohibited them from making the disclosures, they sought advice from an AUSA having no authority or expertise to advise them as to whether the request should be granted. The IRS Agents then made the disclosures.

All that is left is a reading of the statute, its legislative history and the few cases that have addressed the issue. The consideration and resolution of this issue will not be a significant drain on this Court's resources and will resolve an important issue pervading many subsections of Section 6103.

CONCLUSION

We started with the recognition that mere error or doubt as to correctness is not generally a reason to grant the petition. The issue presented is also an important part of the fabric of Section 6103, so vital to the proper functioning of the Internal Revenue Code. And, the holding below conflicts with the key case authority cited as authority for the holding. This case presents this Court an opportunity to affirm that Congress was serious in imposing the limitations in Section 6103. This case also presents the Court an opportunity to dispel any notion that the results below were influenced by the fact that a federal magistrate judge was involved in the underlying facts.

Petitioner respectfully requests the Court to grant the petition.

Respectfully submitted,

JOHN A. TOWNSEND
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Houston, TX 77005
(713) 439-0485

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-20405

ALVY T McQUEEN

Plaintiff-Appellant

U.S. COURT OF APPEALS
FILED
MAR 04 1999
CHARLES R. FULBRUGE, III
CLERK

versus

UNITED STATES OF AMERICA;
NANCY K JOHNSON;
SUSIE M WONG;
MARK W HUGHES

Defendants-Appellees

****

No. 98-20451

ALVY T McQUEEN

Plaintiff - Appellant

versus

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF JUSTICE;
SUSIE M WONG; MARK W HUGHES;
NANCY K JOHNSON, Magistrate Judge

Defendants - Appellees

Appeals from the United States District Court
For the Southern District of Texas
(CA-95-H-1453 & H-91-CV-329)

Before HIGGINBOTHAM, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

AFFIRMED. See 5th Cir. R. 47.6.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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For the Southern District of Texas
(CA-95-H-1453 & H-91-CV-329)

Before HIGGINBOTHAM, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

AFFIRMED. See 5th Cir. R. 47.6.

IT IS FURTHER ORDERED that plaintiff - appellant pay to defendants - appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Apr 05 1999

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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ALVY T MCQUEEN
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U.S. COURT OF APPEALS
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UNITED STATES OF AMERICA; NANCY K JOHNSON;
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Defendants - Appellees

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V.

UNITED STATES OF AMERICA; UNITED STATES
DEPARTMENT OF JUSTICE; SUSIE M WONG;
MARK W HUGHES; NANCY K JOHNSON, Magistrate Judge

Defendants - Appellees

Appeals from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, JONES, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

S/_____
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

		UNITED STATES COURTS
ALVY T. MCQUEEN,	§	SOUTHERN DISTRICT OF TEXAS
Plaintiff	§	APR 01 1998
	§	Michael N. Milby, Clerk of Court
	§	
v.	§	Nos. H-91-0329
	§	and 95-1453
	§	
UNITED STATES OF AMERICA,	§	
et. al.,	§	
Defendants	§	
	§	

REVISED MEMORANDUM OPINION

I.
Prologue

On July 8, 1992, Alvy T. McQueen (McQueen) was indicted by a federal grand jury in the Southern District of Texas, charging twenty-four (24) counts of diesel fuel tax evasion. He plead guilty to Counts 1 and 23 of the indictment which charged him with willfully attempting to evade federal diesel fuel excise taxes. McQueen also waived indictment and voluntarily entered a guilty plea to an information charging one count of conspiracy to impede the collection of diesel fuel excise taxes. On March 16, 1993, Judge Melinda Harmon sentenced him to sixty-months (60) incarceration.

In subsequent civil proceedings, McQueen and his lawyer John Townsend (Townsend), have engaged in an oppressive litigation war against almost everyone connected with McQueen's criminal prosecution. In a prior action, McQueen unsuccessfully sought to recover damages from Texas State Comptroller Bob Bullock. *See*

McQueen v. Bullock, 907 F.2d 1544 (5th Cir. 1989), *cert. denied*, 499 U.S. 919 (1991) (**McQueen II**). He now attempts to reassert many of the same claims which were previously rejected in **McQueen v. Bullock** against, Assistant United States Attorney (AUSA) Pecht (Pecht), who was in charge of the criminal prosecution against McQueen and IRS agents Susie Wong (Wong) and Mark Hughes (Hughes).

In this consolidated suit, McQueen alleges that:

1. Defendants, Pecht, Wong, and Hughes were in contempt of court, and therefore, personally liable for disclosing grand jury information, in violation of Federal Rule of Criminal Procedure 6(e) (Rule 6(e) Claim);

2. Such disclosure violated 26 U.S.C. § 6103 (d), and consequently, the United States is liable for damages under 26 U.S.C. § 7431 (Section 6103(d) Claim);

3. Hughes disclosed information to Pecht in violation of 26 U.S.C. § 6103(h), and consequently, the United States is liable for damages under 26 U.S.C. § 7431 (Section 6103(h) Claim);

4. The Department of Justice refused to release documents in violation of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA Claim);

5. Pecht, Wong, and Hughes conspired to subvert McQueen's substantive and procedural due process rights in a manner actionable under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971) (*Bivens* Claim).

Presently before the court is the United States', Pecht's, Wong's and Hughes' (defendants) motion seeking partial summary judgment against McQueen pursuant to Fed. R. Civ. P. 56. The four issues addressed in this opinion are: 1) should the FOIA claim against the Department of Justice be severed from this case?; 2) should the Rule 6(e) claim be dismissed?; 3) should the Section 6103(d) claim be dismissed?; and 4) should the Section 6103(h) claim be dismissed?[1]

In response, McQueen filed his Motion for Judgment as a Matter of Law, seeking to prevail on the Rule 6(e), Section 6103(d), and Section 6103(h) claims.

The court has considered the parties' arguments in light of the applicable law and for the reasons stated below, the court will: 1) sever H-95-1453 from H-91-0329; 2) dismiss with prejudice H-95-1453 in its entirety; 3) dismiss with prejudice the Rule 6(e), Section 6103(d), and Section 6103(h) claims from H-91-0329; and 4) enter a case management order addressing the plaintiff's sole remaining claim from H-91-0329--the FOIA claim.

II.
BACKGROUND

A. The IRS Search Warrant, Federal Grand Jury Subpoena, and the Seizure of McQueen's Documents.

1. McQueen's Version

McQueen states that around the time of the Project, a federal grand jury was conducting an industry-wide investigation of motor fuels tax evasion in the Houston area. He charges that because he was an individual involved in the motor fuels business, he was already a target of the grand jury investigation. He claims that the

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[1] The Bivens action is not before the court at this time the court having already entered an order dismissing it.

grand jury investigation was jointly conducted by AUSA Pecht and IRS agents Hughes and Wong. He further insinuates that both the Federal Bureau of Investigation (FBI) and the Texas State Comptroller's Office (STCO) were also involved in both the IRS administrative and the grand jury investigations, and therefore they were also investigating McQueen.[2] McQueen argues that it follows that the IRS search warrant, which was executed in Colorado was issued in furtherance of the grand jury investigation. Specifically, McQueen asserts that Pecht, in the course of conducting the "industry-wide" grand jury investigation, in effect issued the Colorado search warrant because she saw Hughes' Application and Affidavit for Search Warrant wherein Hughes provided sufficient facts to show probable cause that McQueen committed tax fraud. He further argues that Pecht's subsequent opening of a federal grand jury investigation targeting McQueen was essentially a sham because all investigations were in effect merged into one, with McQueen the target.

In support of his position, McQueen offers a passage from a brief (Brief) filed by the United States in **McQueen II**. The passage states that prior to June 1988, the U.S. was "conducting an *industry-wide* investigation into the evasion of federal motor fuels excise taxes within the state of Texas. Those investigations encompass both Internal Revenue Service administrative criminal investigations and grand jury investigations. *IRS special agents Hughes and Wong are involved in both the administrative criminal investigations and the grand jury investigations.*" Brief at 3 (internal citations omitted) (emphasis *added*).

2. Defendants' Version

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[2] In sworn affidavits, the defendants and the FBI attest to the fact that neither the FBI, nor the STCO played any role in the administrative investigation, or the later grand jury investigation of McQueen. In contrast, McQueen provides no evidence (other than mere allegations) that either the FBI or the STCO played any role in the IRS administrative investigation, or the later grand jury investigation of him.

On or about January 7, 1987, the IRS Criminal Investigation Division (CID) in Houston opened an Information Gathering Project (Project) to investigate the possible evasion of federal motor fuel taxes. Wong was initially assigned to coordinate the Project and Hughes was subsequently assigned to work with her.

The defendants maintain that evidence developed in the Project led to the opening of a federal grand jury investigation (Grand Jury I) which targeted *an individual who is not a party to this suit*. They acknowledge that AUSA Pecht was in charge of Grand Jury I and that both Hughes and Wong gathered evidence about the target pursuant to their duties on the Project.

Hughes states that sometime around June 7, 1988, he learned from an employee of the STCO that McQueen was being investigated by the STCO for tax fraud and that pursuant to that investigation, the STCO subpoenaed certain documents from McQueen. Later, Hughes learned from a confidential informant (CI) that McQueen was sending documents which had been subpoenaed by the STCO to Colorado for concealment and possible destruction. Hughes states that the IRS, based on the CI's information and evidence gathered in the Project, opened an administrative investigation of McQueen on June 17, 1988. Hughes, who was designated as the lead agent in the IRS administrative investigation, further maintains that although the IRS investigation was coincidental Grand Jury I, the two investigations were entirely unconnected. Finally, the defendants collectively maintain that when the IRS opened its administrative investigation of McQueen on June 17, 1988, McQueen was ***not the target of any federal grand jury investigation.***

Pursuant to the IRS investigation, Hughes sought a search warrant to obtain the documents which McQueen had moved to Colorado. In seeking the search warrant, he was required to have an AUSA review and sign off on the request before presenting it to a

magistrate.[3] To meet that requirement, Hughes presented the search warrant application and an affidavit with enough evidence to raise probable cause for Pecht to sign off on before presenting it to the magistrate. Thereupon, Pecht advised Hughes that he needed the approval of a U.S. Magistrate Judge in the District of Colorado.

Hughes and Wong flew to Colorado on June 18, 1988. On that day, Magistrate Judge Clifton of the District of Colorado authorized Hughes and Wong to execute the search warrant. Later that day, Hughes, Wong, and other law enforcement officers seized documents and property pursuant to the search warrant. Hughes and Wong shipped these seized documents to an IRS-leased space in the federal courthouse in Houston. Defendants maintain that none of the evidence contained in Application and Affidavit for Search Warrant had been presented to or learned from any federal grand jury.

In a curious sequence of events which ultimately led two grand jury investigations targeting McQueen, sometime between June 20 and July 14, McQueen's lawyer, Townsend spoke to AUSA Pecht and volunteered to produce McQueen's business records which had not been seized pursuant to the IRS search warrant. On July 14, 1988, Hughes learned from his CI, that McQueen had begun shredding the documents which Townsend promised to produce. The next day Hughes relayed this information to Pecht who promptly opened a grand jury investigation of McQueen on a charge of obstruction of justice (Grand Jury II). Pecht assigned Hughes to assist with Grand Jury II and had Hughes serve a grand jury subpoena on Townsend. Also July 15, 1988, Pecht asked the IRS for and subsequently received authorization[4] to expand Grand Jury I (hereinafter Grand Jury III) to target McQueen. The defendants

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[3] Pecht, in her sworn affidavit, states at that time U.S. Magistrates in the Southern District of Texas would not consider an Application and Affidavit for Search Warrant if it has not been reviewed and initialed by a federal prosecutor. Pursuant to that policy, Hughes contacted Pecht, who was then responsible for prosecuting most of the tax matters, to obtain the required review.

[4] By letter dated August 8, 1988.

steadfastly maintain, McQueen was not a target of Grand Jury I or any other federal grand jury investigation prior to July 15, 1988 and they also maintain that none of the documents seized pursuant to the Grand Jury II subpoena were disclosed to any STCO employee.

Between June 20 and September 20, 1988, the STCO, which was conducting its own investigation of state motor fuels tax evasion, contacted Wong and Hughes seeking permission to view the documents seized pursuant to the IRS investigation search warrant. Wong and Hughes consulted Pecht to see if such a disclosure was permitted. Pecht advised that such a disclosure was permitted, primarily because the documents sought by the STCO had not shown to a grand jury and were not obtained pursuant to a grand jury subpoena. Hence, beginning September 20, 1988, and continuing for a few weeks thereafter, Wong and Hughes allowed STCO civil auditors to view and photocopy the documents seized pursuant to the Colorado search warrant.

B. Tax Coordination Agreement and Tax Implementation Agreement.

In 1986, the IRS and the STCO entered into an Agreement on Coordination of Tax Administration (TCA). Section 3.2 of the TCA states, "This agreement constitutes the requisite authorization pursuant to section 6103(d)(1) of the Code for IRS to disclose to, and permit inspection by, an [STCO] Representative of Federal returns and Federal return information relating to taxes imposed by . . . Chapter 32--Manufacturer's Excise Tax. . . of the Code."[5]

To implement the TCA, the IRS, and the STCO entered into a corresponding Implementation of the Agreement on Coordination of Tax Administration (TIA). Section I.B of the TIA provides that

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[5] In a sworn affidavit, Mimi Eastman authenticated the Texas Coordination Agreement Section 3.2 of the of which permits the disclosure of Federal Tax Returns and information pursuant to the motor fuel excise tax (imposed by Chapter 32 of the IRS Code) which is at issue in this case.

one purpose of the TIA is "[to] state procedures and understandings concerning the exchange of [federal tax] information." It follows that the TIA was intended as an ancillary statement of procedures rather than as a general request for tax information pursuant to § 6103(d)(1) of the Code.

The TIA sets certain procedures for disclosure of federal tax information to STCO. Under the TIA, when the IRS has information of state tax understatement, an IRS liaison officer must determine that either $1,000 is understated or that the understatement involves a criminal tax violation. Next, the IRS liaison official must contact the STOC liaison officer and describe the return information in question and disclose the identity of the taxpayer. (Section IV.B). If the STOC wants the federal tax return information, it must submit a statement of need, "accompanied [by] or incorporated into a written request for the information signed by . . . designated [STOC] disclosure officer." The TIA further states that, "access [to Federal return information] will be denied without presentation of such signed authorization."*Id.*

3. Analysis

McQueen's version of the facts is neither substantiated nor credible. In a nutshell, McQueen's position rests precariously on his assertions that:

1. Pecht's role in Wong's and Hughes' IRS administrative investigation of McQueen and Wong's and Hughes' roles in Pecht's grand jury investigation of another party were so intertwined that the two investigations were in essence merged into one and consequentially McQueen a target of the grand jury long before he was formally named as a target of the grand jury on July 15, 1988;
2. All documents pertaining to any investigation of McQueen are presumptively before the grand jury; and

3. Any meeting after February 17, 1988 that occurred at any time between Wong, Hughes, and Pecht or any of these named defendants and anyone in the FBI or STCO involved the sharing of information concerning McQueen's personal income tax matters are presumptively 26 U.S.C. § 6103 violations.[6]

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[6] McQueen asserts that the following meetings concern "potential disclosures" of McQueen's tax returns in violation of 26 U.S.C. § 6103:

Date	Parties	Alleged Subject
February 17, 1988	Wong and Task Force [Project] incl. Pecht	To Discuss McQueen
March 11, 1988	Wong and FBI	To Discuss surveillance
March 22, 1988	Wong and FBI	To Discuss surveillance
March 24, 1988	Wong and FBI	To Discuss surveillance
April 11, 1988	Wong and FBI	To Discuss McQueen
May 9, 1988	Wong and FBI	To Discuss McQueen
May 26, 1988	Wong and FBI	To Discuss McQueen
June 10, 1988	Task Force [Project]	To "discuss matters that were then present in McQueen's specific case."
June 15, 1988	Wong and Pecht	Discuss the search warrant
June 27, 1988	Wong and Pecht	Discuss matters related to the search warrant seizure and other matters that defendants assert was solely an IRS administrative investigation
July 12, 1988	Wong and Pecht	Discuss the search warrant
July 13, 1988	Wong and Pecht	To discuss a conversation with Townsend

As evidence that Hughes' and Wong's IRS administrative investigation and Pecht's grand jury investigation merged, McQueen offers the fact that shortly after the documents were seized pursuant to the Colorado search warrant, his attorney Townsend contacted AUSA Pecht and offered to produce McQueen's remaining business records.[7] The imputation being that Townsend made the offer to the one person in charge of the "merged investigation" and that if McQueen was not the target of the grand jury, Pecht would have said so and declined the offer.[8] Because there are so many other explanations for Townsend's offer that are equally or more plausible, McQueen's reliance on this as evidence of a merged investigation is

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June 18– July 15, 1988 "various meetings"	Wong and Pecht	To discuss various conversations with Townsend
September, 1988 "various meetings"	Pecht, Wong, & Hughes	Regarding controller's request for access to search warrant documents

[7] In his deposition, Townsend testified that sometime between mid-June and mid-July 1988, he believed that Pecht possessed a copy of the Application and Affidavit for the search warrant.

[8] Premised in this implication is the notion that McQueen's attorney is infallible in his reading of the events and circumstances surrounding the seizure of the documents pursuant to the Colorado search warrant. The court notes that a common thread which runs through the massive volume of motions, memoranda, and correspondences with which Townsend has inundated this court, is Townsend's continual trumpeting that his credentials as a former IRS attorney and adjunct tax law professor at a local law school somehow affords him "special knowledge or insight" of how any law or regulation related to tax should be interpreted. This Court finds the premise of Townsend's infallibility and the notion that he has "special knowledge or insight" to be somewhat overstated.

misplaced.[9] This court finds Townsend's offer to produce the business records constitutes no real evidence of a merged investigation.

McQueen's reliance on the passage from the Brief is similarly misplaced. *See supra*. Even when viewed in a light most favorable to McQueen, the passage is neither an admission, nor is it evidence that McQueen was a target of any state or federal grand jury investigation before July 15, 1988. At most, the passage is a literal statement of undisputed fact concerning existence of both an IRS administrative investigation and a federal grand jury investigation. Furthermore, the Brief provides not a shred of direct evidence that McQueen was targeted by Grand Jury I.

In contrast, Hughes attested to the fact that he did not use any evidence from any grand jury in the IRS investigation or the application for the Colorado Search Warrant. Likewise, Pecht swore that she had nothing to do with Hughes' and Wong's IRS investigation of McQueen, and that she only examined the documents accompanying Hughes' application for a search warrant in her routine capacity as a federal prosecutor.[10] The defendants also offer the IRS letter August, 8, 1988 permitting Pecht to expand the

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[9] Another equally plausible explanation is that Townsend, knowing of the parallel investigations, realized that McQueen was may have been exposed to significant tax liability if his business records were to be made available to the IRS and STCO administrative investigations. Armed with such knowledge, it is possible that Townsend devised a strategy to limit McQueen's exposure for the unpaid excise taxes by offering the business records to Pecht and Grand Jury I, thereby making them "matters before the grand jury" and potentially shielding them from both the IRS' and STCO's investigations. Knowing someone other than McQueen was the target of Grand Jury I, such a strategy, if successful, may have limited McQueen's exposure for the unpaid excise taxes by making the documents needed to compute the true extent of his tax liability potentially unavailable to the administrative investigations because of Rule 6 and yet not expose McQueen to significant criminal liability.

[10] Townsend deposed both Hughes and Pecht. During these depositions both Hughes and Pecht continuously maintained they were involved in no "industry-wide" investigation in which McQueen was the target.

grand jury to target McQueen as further evidence that he had not previously been a target of Grand Jury I.

In this court's opinion, McQueen's assertion that Grand Jury I and the IRS administrative investigation were merged is merely a statement of his subjective belief and is unsupported by the evidence. Furthermore, McQueen's failure to produce tangible evidence that Grand Jury I was merged with the IRS investigation was not for his lack of trying. During discovery, McQueen conducted numerous lengthy depositions, and gathered many documents, none of which he is able to point to as evidence in support of his position. Any further discovery on this point would be futile. Therefore, this court finds the IRS administrative investigation and Pecht's grand jury investigation were distinct and parallel investigations and were not merged.[11]

McQueen's second assertion that all documents pertaining to any investigation of McQueen are presumptively "matters before the grand jury" is grounded on his first assertion and therefore, must be considered in light of this court's finding that the IRS administrative investigation and Grand Jury I were not merged. Because there was no merger of the investigations, this court holds there can be no presumption that all documents, particularly those seized pursuant to the Colorado search warrant, are "matters before the grand jury". Absent a presumption to rely upon, McQueen must show by a preponderance of the evidence that a document was shown to the grand jury or acquired pursuant to a grand jury subpoena or grand jury proceeding in order to be a "matter before the grand jury".

The court looks at McQueen's assertion that various meetings between the named defendants and the FBI presumptively constitute violations 26 U.S.C. § 6103. ***See Fn. 6, supra.*** No

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[11] After a thorough examination of Wong's and Hughes' time records, this court notes that Wong and Hughes carefully delineated which activities were part of the IRS investigation and which activities were part of the grand jury investigation. In short, those conducting the investigations acted as if there were two separate and distinct investigations – supporting this court's conclusion there was no merger.

reasonable person can draw such a inference from these meetings, and McQueen offers no tangible evidence that disclosures of tax returns or tax information occurred during any these discussions. Absent evidence to the contrary, this court sees nothing more than a log of routine meetings and activities conducted by IRS investigative agents in their pursuit of an entity suspected of criminally evading the payment of a tax. Again, this court notes that McQueen's failure to produce tangible evidence of a disclosure is not for his lack of trying and this court is of the opinion that additional discovery on the issue of what transpired during these meetings, conducted over ten (10) years ago, would serve little purpose.[12] No presumption of a violation of § 6103(h) is warranted. Accordingly for McQueen to state a § 6103(h) claim he must prove by a preponderance of the evidence that an actual disclosure tax returns or tax information occurred.

Without offering a shred of direct evidence in support his assertions and over the attested denials of the defendants and those not a party to this case, McQueen invites this court to adopt his inferences and presume that the investigations were merged, the defendant violated Federal Rule of Criminal Procedure 6(e), and that the defendant's activities were presumptively violations of 26 U.S.C. § 6103 (d) and (h). Absent tangible evidence, this court cannot in good conscience accept such an invitation. This court finds that McQueen's inferences are nothing more than unsubstantiated conjecture and innuendo, and consequentially his version of the facts is not credible.

III.
DISCUSSION

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[12] There is no evidence that what transpired during these meeting was in some way documented. The fact that McQueen conducted court supervised depositions of Hughes and Pecht which failed to produce any tangible evidence leads this court to believe that taking Agent Wong's deposition as to what she might remember about a number of meetings held over 10 years ago would be an exercise in futility.

A. Summary Judgment

A motion for summary judgment will be granted if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden then shifts to the nonmoving party who, "may not rest upon the mere allegations or denials [in its] pleadings, but the [nonmoving] party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In determining the existence of a genuine issue for trial, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." ***United States v. Diebold, Inc.,*** 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." ***Id.*** at 249. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" ***Matsushita Electric Industrial Co. v. Zenith Radio Corp.,*** 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

1. FOIA Action

McQueen's FOIA claim is aimed at the DOJ, a distinct party from Wong, Hughes, and Pecht. Furthermore, the DOJ is not a party to McQueen's Rule 6 and Section 6103 claims. In the interests of justice, this court, in accordance Fed R. Civ. P. 20(b), will sever the

FOIA claim from the Rule 6(e) and Section 6103 claims in H-95-1453 and adjudicate it separately.

2. Rule 6(e) Action

McQueen claims that Wong, Hughes, and Pecht should be held in contempt of court and be required to pay damages for an alleged violation of Federal Rule of Criminal Procedure 6(e). ***FED. R. CRIM. P. 6(e)*** (West 1998). Rule 6(e) provides that, with the exception of certain specified circumstances, "matters occurring before the grand jury" are to be kept secret.[13] The purpose behind this rule is to:

1) prevent the escape of those whose indictment may be contemplated;

2) encourage crime witnesses to speak, knowing that their identity will not be revealed to the person against whom they are testifying;

3) avoid injury to the reputation of those accused, but not indicted of crimes;

4) encourage grand jurors to investigate suspected crimes without inhibition and to engage in unrestricted deliberations.

In re Grand Jury Investigation (Lance), 610 F.2d 202, 213 (5th Cir. 1980) (*citations omitted*).[14] Rule 6(e)(2) further provides that a court may punish a knowing violation of Rule 6(e) by citing the

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[13] None of the parties maintain that any of the exceptions to the general secrecy requirement of Rule 6(e) are applicable in this case.

[14] It follows that Rule 6(e) as it applies to this case, that the rule is not so concerned with McQueen's privacy as it is with keeping the actual grand jury process impartial and untainted. McQueen was not only indicted, but he pleaded guilty and was incarcerated.

offender for contempt of court. *FED. R. CRIM. P. 6(e)* (West 1998).

In *Lance*, a Georgia banker, was the target of a grand jury investigation for activities he was engaged during his association with National Bank of Georgia. *Lance*, 610 F.2d at 207. During the pendency of the grand jury investigation and before any indictments were returned, Lance charged that the AUSA conducting the grand jury and possibly several members of it purposefully leaked grand jury information to various newspapers and press information services. *Id.* at 208-10. These newspapers published the information and implied that the source of the leaks was the AUSA's office. *Id.*

Even though the supervising district court ordered the AUSA to eliminate the leaks, that order was only partially successful. *Id.* Subsequent leaks to the press contained both newly developed grand jury information and Lance's attempt to curtail the leaks. Lance, claiming harm from the leak petitioned the district court for three forms of relief: 1) that all persons associated with the grand jury probe be ordered to show cause as to why contempt sanctions should not be imposed; 2) that the court examine each member of the grand jury in camera to ascertain whether the juror violated the secrecy obligation of Rule 6(e); and 3) that the court imposing sanctions, up to and including the dismissal of the grand jury and barring the DOJ from indicting him, upon those responsible for the leaks. *Id.* at 211.

The Fifth Circuit held that Lance stated a *prima facie* case of a Rule 6(e) violation by offering tangible evidence[15] that grand jury information was leaked and that the source of the of the leaks was the AUSA's office. *Id.* at 220. The court further held that, because Lance had stated a *prima facie* case, he was entitled to an

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[15] Lance presented tangible evidence to the court in the form of newspaper articles which published details from the grand jury proceedings which would not be discovered absent a leak and which attributed the leaks to "someone close to the grand jury." *Lance*, 610 F.2d at 208-10.

evidentiary hearing by the district court to show cause order why the AUSAs should not be held in contempt for violating the district court's order to stop the leaks. *Id.* at 220-221. Significantly, the Fifth Circuit construed Lance's motion as seeking *civil, not criminal*, contempt sanctions under Rule 6(e)(2) ("A knowing violation of Rule 6 may be punished as a *contempt of court.*"). *Id.* at 212-213 (*emphasis added*).

This ruling has been interpreted as granting the target of a grand jury investigation a very limited right to seek *injunctive relief or civil contempt of court through the district court supervising the grand jury*. **See Berry v. United States**, 275 U.S. App. D.C. 218, 865 F.2d 1317, 1321 (D.C. Cir. 1989).[16] Nowhere has Lance been interpreted as granting a grand jury target a private right of action to seek damages in an independent lawsuit. Other circuits which have addressed this issue, have concluded that a grand jury target has no independent private right of action for damages or even equitable relief for a Rule 6(e) violation. ***Finn v. Schiller***, 72 F.3d 1182 (4th Cir. 1996); **See also Blalock v. United States**, 844 F.2d 1546 (11th Cir. 1988).[17] Also persuasive, is the Supreme Court's discourse on

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[16] *See Blalock v. United States*, 844 F.2d 1546 (11th Cir. 1988); *Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996).

[17] The 4th Circuit stated, "Although we find that the language of the rule provided both civil and criminal contempt, it does not follow that the rule creates a private [independent] cause of action. A claimant may notify the court of a violation of the rule or petition the court to investigate an alleged violation, but such complainant may not proceed by way of a civil action against the alleged violator. *[T]here is no such thing as an independent cause of action for civil contempt.*" *Finn*, 72 F.3d at 1188 (*emphasis added, citations omitted*).

In a case that is factually most analogous to the instant matter, the 11th Circuit in *Blalock v. United States*, specifically found that the target of a grand jury had no Rule 6(e) cause of action for equitable relief when there was an adequate remedy at law. *Blalock*, 844 F.2d at 1456. The target of a grand jury investigation filed a private suit to enjoin a impending indictment because the FBI agents working with the federal grand jury investigating fraud and bid rigging allegations were allegedly collaborating with a private investigation being conducted by Georgia Power Company. *Id.* at 1548. The court found that the proper remedy was to move the district court to dismiss the indictment. *Id.* at 1549.The court noted that , in

remedies for a Rule 6(e) violation:

> For example, a knowing violation of Rule 6 may be punished as a contempt of court. In addition the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced plaintiff.

Bank of Nova Scotia v. United States, 487 U.S. 250, 263, (1987)(internal citation omitted). Again, there is no mention of a private right of action to sue for damages in an independent lawsuit for an alleged violation of Rule 6(e).

This court finds the reasoning in **Finn** and **Blalock** both persuasive and consistent with the Fifth Circuit's holding in **Lance** and therefore expressly adopts it.

a. Civil Damages

On less favorable facts, and without tangible evidence that a Rule 6 violation even occurred, McQueen seeks relief far in excess of that which was granted by the Fifth Circuit in ***Lance***. Unlike the grand jury target in ***Lance***, McQueen offers no evidence of adverse

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Lance, the Fifth Circuit held that a target has *the right to ask the district court* to require anyone wrongfully disclosing grand jury matters to show cause why he should not be held in civil contempt and sanctioned....[thus giving] a target a right of action fer injunctive relief against the members of the grand jury and prosecutors assisting them in their investigation. "We make this statement because *there is no such thing as an independent cause of action for civil contempt;* civil contempt is a device used to coerce compliance with an in personam order of the court which has been entered in a pending case. ***Id.*** at 1550 (***emphasis added***).

media publicity surrounding the grand jury,[18] no evidence that anyone in the public even knew of any grand jury investigation which targeted him, and no evidence that the documents Wong and Hughes seized pursuant to the Colorado search warrant and shared with the STCO had been shown to the grand jury. In other words, he offers no tangible evidence that matters before the grand jury had been leaked. Instead, he asserts that he is entitled to a presumption that the parallel investigations were merged and consequently that he is entitled to a presumption that documents seized pursuant to the Colorado search warrant investigations are constructively "matters before the grand jury".

Also unlike *Lance*, where the target petitioned the supervising district court for relief from the leaks of grand jury information, McQueen never complained to the supervising district court about any alleged leak of grand jury information. Instead, McQueen filed a series of independent civil suits seeking tort damages for what he claims was a sharing of information between the parallel state and federal investigations. By so doing, McQueen seeks not to correct an alleged leak but rather, to punish the defendants for their roles in the various investigations of McQueen's illegal activities by seeking actual and punitive damages to the tune of nearly $8,000,000.[19]

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[18] "First, there must be a clear indication that the *media reports* disclose information about matters occurring before the grand jury." *Lance*, 610 F.2d at 216 (internal quotation omitted, *emphasis added*); "It is generally understood that a *prima facie* case of a violation of Rule 6(e)(2) is made when *'the media reports disclosed information about 'matters occurring before the grand jury' and indicated that the sources of information included attorneys and agents of the Government.'"* *Berry v. United States*, 275 U.S. App. D.C. 218, 865 F.2d 1317, 1321 (D.C. Cir. 1989)(*emphasis added*).

[19] McQueen claims he was damaged [prejudiced] to the tune of nearly $8,000,000 as a result of alleged information sharing between the federal grand jury and a parallel state investigation of evasion of motor fuels taxes. His claim is premised on his assertion that the tax assessment levied by the State of Texas increased from approximately $275,000 to $8,000,000 as a result of the alleged information sharing. In short, McQueen is saying that if information had not been

This court is also of the opinion that it would be bad policy to grant a private right of action for damages for a Rule 6 violation in an independent lawsuit. The recognition of such a right would be highly detrimental to our grand jury system in that it would chill the investigative power of the grand jury by exposing federal investigators and prosecutors and grand jury members to potentially ruinous civil liability and legal costs for defending suits filed for no other purpose than to harass and interfere with the grand jury process and those involved. It would also encourage the target of a grand jury investigation to sandbag the reporting of a leak to the supervising district court because it would be more advantageous to file an private civil suit seeking damages.[20] This would deprive the district court of the opportunity to investigate the complaint and correct any alleged violation.

Finally, because of our liberal discovery rules in civil suits, an independent suit would expose grand jury deliberations, the identity of grand jurors, and other grand jury matters to the public. This would not only inhibit the grand jury's deliberative process, it would potentially expose grand jury members, government lawyers and agents, and witnesses to outside pressures and possible danger. In short, it would eviscerate the very protections to the grand jury

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shared, the State of Texas Comptroller's Office would have not learned the true extent of his evasion of state motor fuels tax and his liability would have been limited to initial $275,000 assessment. In seeking a summary judgment granting these damages, McQueen, without offering a shred of tangible evidence as to the alleged information sharing, incredibly asks this court to: 1) accept his unsupported assertions and shift the burden to the defendants to show otherwise; 2) ignore the sworn testimony and evidence presented by the defendants to the contrary; 3); and 4) impose his huge state tax liability on Wong, Harris and Pecht.

[20] Such independent suits can be used as a means to gain leverage in the target's criminal proceedings or as a means to collaterally attack an indictment or conviction in a subsequent suit.

This court can envision an all-to-realistic scenario in which the AUSA is placed in an intractable conflict of interest by having to bargain away the government's right to enforce its laws by prosecuting a grand jury target in exchange for a personal release of civil liability or to avoid the costs to defend an independent civil suit.

process Rule 6 was intended to provide.

McQueen offers no legal authority for a private right to seek civil and punitive damages for an alleged Rule 6(e) violation in an independent law suit and this court's extensive research could find none. Furthermore, McQueen makes no persuasive equitable or policy argument for the expansion of the narrow rights conferred by the *Lance* court.

On both the law and the facts of this case, the court is of the opinion that McQueen does not have a private right to seek damages for an alleged Rule 6 violation and that allowing him to proceed on this claim would be contrary to the Supreme Court's guidance from *Bank of Nova Scotia* and this court's express adoption of the holdings of *Berry*, *Finn*, and *Blalock*. *Supra*.

In light of the above, this court holds that McQueen states no claim for actual and punitive damages for the alleged violation of Federal Rule of Criminal Procedure 6(e) and therefore, his Rule 6 claim for damages must be dismissed with prejudice in accordance with Fed. R. Civ. P. 12 (b)(6) and 56.

b. Contempt of Court and Equitable Relief

To obtain equitable relief in accordance with *Lance*, McQueen must first make a *prima facie* showing of a Rule 6(e) violation. To do so, he must show a "clear indication" that the alleged disclosure concerned "matters occurring before a grand jury." *Lance*, 610 F.2d at 216. Lacking any real evidence, McQueen attempts to raise a presumption that all documents collected by Wong and Hughes pursuant to the Colorado search warrant were "matters before the grand jury" by citing to *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 77 L. Ed. 2d 743, 103 S. Ct. 3133 (1983), and *United States v. Baggot*, 463 U.S. 476, 77 L. Ed. 2d 785, 103 S. Ct. 3164 (1980).

This court is wholly unpersuaded by McQueen's argument

that ***Baggot*** and ***Sells*** resolve the issue of whether the documents Wong and Hughes seized pursuant to the Colorado search warrant were "matters occurring before a grand jury". On the facts alone, ***Baggot*** and ***Sells*** are distinguishable and thus, offer no support for McQueen's argument that the documents obtained pursuant to the Colorado search warrant were constructively matters before the grand jury.

In ***Sells***, the grand jury indicted a corporation and two of its officers on two counts of conspiracy and nine counts of tax fraud. The defendants plead guilty to one count of conspiracy, and all the remaining charges were dismissed. Thereafter, the government moved for disclosure of all grand jury materials for use in commencing a possible civil suit against the defendants under the False Claims Act. ***Sells***, 463 U.S. at 421-22. The Supreme Court held that the disclosure of such documents is permissible only with a court order issued upon the government's showing of particularized need.[21] ***Sells*** is distinguished on the facts from this case in that it was uncontrovertible that the ***Sells*** documents were literally "matters occurring before the grand jury" because they had actually been presented to the grand jury.[22] In contrast, McQueen presents no

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[21] To show particularized need, the government must demonstrate that: 1) the material sought is needed to avoid a possible injustice in another judicial proceeding; 2) the need for disclosure is greater than the need for continued secrecy; and 3) the request for documents is structured to cover only material so needed. ***Id.*** at 443, 103 S. Ct. 3148.

[22] At issue in ***Sells*** was whether Rule 6(e)(3)(C)(I), which provides a specific exception for the broad secrecy requirement of Federal Rule of Criminal Procedure 6(e), was applicable to the case. Rule 6(e)(3)(C)(I) in pertinent part states: "Disclosure ***otherwise prohibited by this rule*** of matters occurring before the grand jury may also be made--when so directed by a court preliminarily to or in connection with a judicial proceeding." (***emphasis added***). The Supreme Court held that disclosure of "matters occurring before the grand jury" to government attorneys for use in a related civil suit is permissible only with a court order under Rule 6(e)(3)(C)(I), and that the district court did not correctly apply the particularized-need standard for issuance of such an order. ***Sells***, 463 U.S. at 442-43.

evidence that any of the documents Hughes and Wong showed the STCO were actually presented to the grand jury, instead he argues that the documents were constructively "matters before the grand jury" because the investigations were at least parallel if not merged.

Similarly, ***Baggot*** is distinguished from this case in that it also concerned documents which had *already been shown* to a grand jury and hence were undisputably "matters occurring before a grand jury".[23] ***Baggot***, 463 U.S. at 477. In this case the defendants have steadfastly denied that the documents shown to the STCO had been presented to Grand Jury I and McQueen has presented no evidence to the contrary.

This court having already held that the facts of this case show there was no merger between the STCO investigation, the IRS administrative investigation and Grand Jury I finds McQueen's contention that the documents were constructively "matters occurring before the grand jury" wholly without merit. Furthermore, it is unpersuaded by McQueen's assertion that ***Sells*** and ***Baggot*** give rise to a presumption that when a grand jury investigation parallels a related court proceeding or administrative agency investigation, all information obtained in the court or administrative investigation are constructively "matters occurring before a grand jury".[24] None of the

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[23] In ***Baggot***, the target of a special grand jury investigation, though never indicted, plead guilty to two counts of violating the Commodities Exchange Act. ***Baggot***, 463 U.S. at 477. Eight months later, the government filed a motion pursuant to Rule 6(e)(3)(C)(1), seeking disclosure of grand jury transcripts and documents to the IRS for use in an audit. ***Id.*** The Supreme Court held that the documents sought were not for use "preliminarily to or in connection with a judicial proceeding" because "the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels." ***Id.*** at 480.

[24] McQueen also cites dictum from ***In re Grand Jury Subpoena (Four Cases)***, 920 F.2d 235, 243 (4th Cir. 1990) (emphasis added), for the proposition that *if a grand jury investigation and a parallel administrative IRS investigation are sufficiently merged*, documents uncovered in the parallel IRS investigation are grand jury matters. Though this court is not bound by the holding

cases cited by McQueen support such a broad proposition and therefore, McQueen's reliance on these cases is misplaced. Lacking any legal presumption, McQueen may not rely on mere innuendo to meet his burden of demonstrating a "clear indication" that the documents were "matters occurring before a grand jury".

This court therefore, holds that McQueen has not met the burden of demonstrating a "clear indication" that the information which Wong and Hughes collected pursuant to the Colorado search warrant and which they shared with the STCO constituted "matters occurring before the grand jury". Consequently, McQueen has not made a prima facie showing that there was a Rule 6(e) violation which would entitle him to any injunctive relief.

Assuming *arguendo* that McQueen could, at this juncture, make *prima facie* case that a Rule 6(e) violation occurred, this court would be at a loss as to fashioning any sort of equitable relief. McQueen, who failed to petition the supervising district court for relief at the time the alleged violation, points to no court order with which the defendants refused or failed to comply thereby justifying an order of contempt.[25] Similarly, there is no ongoing violation or behavior which would warrant an injunction. And, this court will not even consider disturbing McQueen's criminal conviction which was based upon his voluntary pleas of guilty to two counts of the

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in ***Four Cases***, it does note that the holding in ***Four Cases*** stands for the converse proposition, that if the grand jury investigation and the IRS administrative investigation are essentially independent, documents seized in the IRS investigation are not grand jury matters. ***Id.*** The court also notes the proposition is dependent on a finding that he investigations are sufficiently merged. ***See emphasis***. The converse finding was made in this case.

[25] This court's use of its contempt power against the defendants in this case, not coerce the defendants compliance with anything. Instead, would constitute a "criminal-like" punishment absent all of the due process safeguards.

indictment and to one count of the information.[26]

Despite McQueen's exhaustive arguments, he fails to offer "clear evidence" showing that the IRS administrative investigation and Grand Jury I were merged. His reliance on inference and innuendo does not raise a genuine issue of material fact, and therefore cannot defeat the defendants' Motion for Summary Judgment. ***Krim v. BancTexas Group, Inc.***, 989 F.2d 1435, 1442, n.4 (5th Cir. 1993) (party seeking to opposing summary judgment must adduce admissible evidence; unsubstantiated assertions of a dispute are not enough).

Accordingly, the defendants' Motion for Summary Judgment shall be granted, and McQueen's claims for damages and equitable relief for an alleged violation of FED. R. CRIM. P. 6(e) shall be dismissed with prejudice in accordance with FED. R. CIV. P. 12(b)(6) and 56.

2. Section 6103(d) and Section 6103(h) Claims

Title 26 United States Code § 6103 generally prohibits the disclosure of a taxpayers federal tax return information by, among others, any employee or official of the United States. 26 U.S.C. § 6103(a). A aggrieved taxpayer may bring a claim for a violation of § 6103 in the district court pursuant to 26 U.S.C. § 7431 provided that he brings the action within two-years from the date of discovery. 26

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[26] McQueen and his lawyer Townsend admit that they were aware as early as mid-June, 1988 and certainly no later than February, 1991 (when the instant suit was filed), they were aware of the alleged Rule 6 violation. This court cannot understand why, in the two to five years between their learning of the alleged Rule 6 violation and McQueen's voluntary pleas of guilty to the criminal charges, McQueen and Townsend failed to petition the court to have the indictment quashed, or have the grand jury dismissed or have the court bar the government from indicting McQueen. Assuming there was a Rule 6 violation, the district court could, at the time, have fashioned an equitable remedy that would have both timely and effective. The fact that they pursued this untried parallel path is a prime illustration of the evils underlying this court's rationale for finding that no private right of action can exist for a Rule 6 violation.

U.S.C. § 7341 (West 1997). Any recovery, however, will be denied if the IRS acted on a "good faith but erroneous interpretation" of § 6103. ***Wilkerson v. United States***, 67 F.3d 112, 115 (5th Cir 1995); 26 U.S.C. § 7431(b).

a. Section 6103(d) Claim

Section 6103's general prohibition against disclosure of tax information is subject to certain exceptions contained within § 6103 itself. In particular, 26 U.S.C. § 6103(d) provides an exception for disclosure of tax returns and return information to state tax officials, provided that the following three conditions are met:

1) Such disclosures may be made only "for the purpose of, and only to the extent necessary in, the administration of" state tax laws [The Administration Requirement];
2) Such disclosures may be made only "upon *written* request of the head of" the state "agency, body or commission" charged with responsibility for the administration of state tax laws [The Written Request Requirement]; and
3) Such disclosures may be made only to individuals who are designated in the *written request* [see Condition 2, *supra*] "as the individuals who are to inspect or receive returns or return information on behalf of such agency, body or commission." [The Designation Requirement].

26 U.S.C. § 6103(d)(*emphasis added*).

There is no dispute that the Administration Requirement was satisfied. The defendants contend that the general request for tax

information in section 3.2 of the Texas Coordination Agreement[27] satisfies the Writing and Designation Requirements. McQueen contends that the defendants' failure to follow certain procedures concerning the exchange of federal tax disclosure information in the Texas Implementation Agreement (TIA) indicates that the Writing and Designation Requirements were not complied with.

In ***Smith v. United States***, the Seventh Circuit had an opportunity to address this issue on facts similar to those in this case.[28] ***Smith v. United States***, 964 F.2d 630 (7th Cir. 1992), cert. denied, 506 U.S. 1067, 113 S. Ct. 1015 (1993). The issue in ***Smith*** was whether the IRS Director complied with the Writing and the Designation Requirements. Smith argued that he did not because the IRS Director "*did not receive a specific, written request from the head of the IDR for information about Smith's tax status.*" In response the government argued that two agreements between the IDR and the IRS, the Agreement on Coordination of Tax Administration (Coordination Agreement) and its corresponding Implementation Agreement constituted a standing Written Request. 964 F.2d at 632-33.

Like the Texas Coordination Agreement, the Illinois Coordination Agreement contained a blanket request for certain tax information. (Section 3.2 provided: "This agreement constitutes the requisite authorization pursuant to section 6103(d) to disclose...Federal return information...."). ***Id.*** at 633. The Seventh Circuit held that this standing, blanket request complied with the Written Request Requirement. ***Id.*** at 634-65.

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[27] "This agreement constitutes the requisite authorization pursuant to section 6103(d)(1) of the Code for IRS to disclose to, and permit inspection by, an [STCO] Representative of Federal returns and Federal return information relating to taxes imposed by ...Chapter 32--Manufacturer's Excise Tax... of the Code."

[28] Plaintiff Smith was employed by the Illinois Department of Revenue (IDR) as a liaison official between the IDR and IRS. Smith was fired when the District Director of the IRS (IRS Director) informed the IDR Director that Smith did not file federal income tax returns for two years. ***Id.*** at 631.

Furthermore, the Illinois Coordination Agreement did not designate a specific IDR individual entitled to receive information from the IRS; rather, it provided (as does the Texas Coordination Agreement) that "Agency Representatives" may receive information. *Id.* at 634. Nevertheless, the Smith court held that this designation, while phrased in general terms, satisfied the Designation Requirement. *Id.* The court explained, "Nothing in [§ 6103(d)] suggests that the designation cannot be a general one, to be implemented by the head of the state tax agency in accord with the agency's internal procedural guidelines." *Id.*

The Seventh Circuit held that the legal effect of the Coordination agreement is not contingent upon the provisions of the Implementing Agreement and that the Coordination Agreement alone, fulfills the Written Request Requirement and trumps the Implementing Agreement. *Id.* at 635-36.

This court finds the Seventh Circuit's reasoning in *Smith* persuasive.[29] Here, as in *Smith*, the legal effect of the Texas Coordination Agreement is not contingent on the TIA. The TIA was intended as an ancillary statement of procedures, rather than as general request for tax information pursuant to § 6103(d)(1). Therefore, this court is of the opinion that there is no genuine issue of material fact that Wong's and Hughes' disclosure of the materials seized pursuant to the Colorado search warrant satisfied the requirements of § 6103(d). It did as a matter of law.[30]

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[29] The Tenth Circuit also found the reasoning by the Seventh Circuit in *Smith* persuasive. See *Long v. United States*, 972 F.2d 1174, 1179-80 (10th Cir. 1992).

[30] The court also notes that the STCO subpoenaed these records from McQueen and would have taken possession of them pursuant to that subpoena had not McQueen tried to conceal them by moving them to Colorado. In short the STCO would legally have been in possession of any and all of McQueen's state and federal tax records that were in the Colorado documents without ever having had to request them from the IRS.

Accordingly, this court holds that Wong's and Hughes' disclosure to the STCO of the documents seized pursuant to the Colorado search warrant was conducted in accordance with the requirements 26 U.S.C. § 6103 and that McQueen states no cause of action for a violation thereof under 26 U.S.C. § 7431. Accordingly, the defendants are entitled to summary judgment in accordance with Fed. R. Civ. P. 56 and McQueen's § 6103(d) action shall be dismissed with prejudice.

b. Section 6103(h) Action

McQueen alleges that when Hughes contacted Pecht for approval of the Application for the Colorado search warrant, he violated 26 U.S.C. § 6103(h) by showing her the facts upon which probable cause was based. Section 6103(h) permits the IRS to disclose Federal return information to the DOJ only if three requirements are satisfied. First, the disclosure may be made only to a DOJ employee directly engaged in a judicial proceeding (or an investigation preceding such a proceeding), and solely for their use in the proceeding. Second, the disclosure must be related to such a proceeding in a way described in the statute, including, but not limited to, being a proceeding which arose "out of, or in connection with, determining the taxpayer's...criminal liability." And third, an agent of the IRS may disclose on his own motion, where a case has been "referred" by the IRS to the DOJ. 26 U.S.C. § 6103(h) (West 1997). McQueen alleges that these three statutory requirements were not satisfied. This court disagrees.

First, Hughes made the disclosure to Pecht solely for the purpose of helping the IRS obtain a search warrant pursuant to an IRS administrative investigation of a possible criminal violation of the IRS tax code. Second, when he made the disclosure, Hughes was investigating whether McQueen committed a criminal violation of the tax laws. Finally, the IRS "referred" the case to DOJ within the

purview of § 6103(h).[31] This court finds no genuine issue of material fact that the disclosure of the information contained in the search warrant Application and Affidavit met the statutory requirements of § 6103(h).

In his request for clarification of this court's first memorandum opinion, Townsend alleges that the numerous meetings between the defendants and the defendants and the FBI as § 6103(h) violations. *See Fn. 6, supra.* This court finds McQueen's assertion that Wong's and Hughes' discussions with the FBI regarding the surveillance of the Livingston Oil facilities (McQueen's company) constitutes a violation of § 6103(h) particularly specious. This court's examination of the Wong's and Hughes' records of these meetings reveal nothing more than routine meetings and activities conducted by IRS investigative agents in their pursuit of an entity suspected of evading the payment of a tax. No reasonable person can logically conclude that tax matters were disclosed during any these discussions. As with his other allegations McQueen, despite considerable discovery, offers no evidence in support of this allegation. Instead, he relies solely on conjecture and innuendo in an effort to continue this abusive litigation.

Finally, this court holds that, even if McQueen could show a violation of § 6103(h) his claim would be barred by the statute of

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[31] Though the term "referred" is not defined in the statute, the Joint Committee on Taxation stated that the Congress intended the term "referred case" to cover situations like the one in this case: "For purposes of [section 6103(h)] the referral of a tax matter by the IRS to the Justice Department would *include those disclosures made by the IRS to the Justice Department in connection with the necessary solicitation of advice and assistance with respect to a case prior to a formal referral of the entire case* to the Justice Department for defense, prosecution or other affirmative action." Staff of Joint Committee on Taxation, 94th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1976, 322 (1976), 1976-3 C.B. (Vol. 2) 334 (emphasis added.) Courts often rely upon the explanations of the Joint Committee in interpreting the federal tax code. See *Allison v. United States*, 701 F.2d 933, 940 n.9 (Fed. Cir. 1983); *Estate of Cappi v. Commissioner*, 698 F.2d 17, 19 (1st Cir. 1983); *Federal Power Commission v. Memphis Light, Gas & Water Div.*, 411 U.S. 458, 472; 93 S. Ct. 1723, 1731, 36 L. Ed. 2d 426 (1973).

limitations. 26 U.S.C. § 7341(d) (West 1997). Section 7341(d) provides that anyone aggrieved by a wrongful disclosure in violation of § 6103(h) must file suit within two years of the date of discovery of the unauthorized disclosure.

In his deposition, McQueen's attorney, Townsend, testified that sometime between mid-June and mid-July 1988, he believed that Pecht possessed a copy of the Application and Affidavit for the search warrant. At that point, McQueen's lawyer is charged with having discovered the alleged violation for the purposes of the two-year statute of limitations. By this court's generous computation, he had until July 1990 to file his claim or be forever barred. McQueen however, waited until February, 1991 which is clearly outside the time limit. Accordingly, McQueen's claim under § 6103(h) is time-barred.

This court holds that McQueen has failed to state any claim under 26 U.S.C. § 6103(h). Therefore, the defendants are entitled to summary judgment in accordance with Fed. R. Civ. P. 56 and McQueen's § 6103(h) claim shall be dismissed with prejudice.

IV.
CONCLUSION

For the reasons set forth above, the court will sever the FOIA claim, grant the defendants' Motion for Summary Judgment, and deny McQueen's Motion for Judgment as a Matter of Law, pursuant to Fed. R. Civ. P. 56 on the Rule 6(e) and all § 6103 claims before this court.

All relief not specifically granted herein will be denied.

Appropriate orders will be entered.

Signed this 28 th day of March, 1998.

HOWELL COBB

UNITED STATES DISTRICT JUDGE

AGREEMENT ON COORDINATION OF TAX ADMINISTRATION

SECTION 1. Introduction

1.1 This agreement provides the basis for coordination of Federal and State tax administration. The parties to this agreement will explore and adopt mutually acceptable techniques and modes of exchange most beneficial to improved tax administration with the least possible interruption of their respective operating routines and with strict adherence to laws, regulations, and rules for protecting the confidentiality of exchanged information.

1.2 This agreement may be supplemented by an implementing agreement, prescribing the nature, quantity and mechanics for the continuous exchange of tax information, including criteria and tolerance for selection of tax returns and return information as well as other cooperative activities. If an implementing agreement has been approved, subsections preceded by asterisks (*) will have corresponding provisions in the implementing agreement which should be consulted for more detailed information about specific working arrangements and operational procedures for the exchange of tax information authorized by this agreement. All provisions contained in implementing agreements must be consistent with the terms and conditions in this agreement. In any situation where a conflict arises between the provisions of this agreement and the implementing agreement, the terms of this agreement will govern.

SECTION 2. Definitions

For purposes of this agreement, the following definitions apply:

2.1 Agency. The term "Agency" means State Comptroller of Public Accounts.

2.2 IRS. The term "IRS" means the Internal Revenue Service, U. S. Department of the Treasury.

2.3 State Audit Agency. The term "State Audit Agency" is defined in the same manner as provided in section 6103(d)(2)(B) of the Code. State Audit Agency means State Auditor's Office.

2.4 State. The term "State" means the State of Texas.

*2.5 Agency Representative. The term "Agency Representative" means an Agency officer or employee designated in writing by the head of the Agency, to the District Director(s) at Austin, Texas; Dallas, Texas; and Houston, Texas, and the Service Center Director at Austin, Texas, as an individual who is to inspect or receive Federal returns or Federal return information on behalf of the Agency as provided by section 6103(d) of the Code, but only so long as the duties and employment of such officer or employee require access to Federal returns and Federal return information for purposes of State tax administration.

*2.6 IRS Representative. The term "IRS Representative" means an officer or employee of the IRS who has been designated in writing to the head of the Agency by the District Director(s) at Austin, Texas; Dallas, Texas; and Houston, Texas, or the Service Center Director at Austin, Texas, as an individual who is to inspect or receive State returns or State return information on behalf of IRS, but only so long as the duties and employment of such officer or employee require access to State returns or State return information for the purpose of Federal tax administration.

2.7 Federal Return. The term "Federal Return" is defined in the same manner as provided in section 6103(b)(1) of the Code

2.8 Federal Return information. The term "Federal Return Information" is defined in the same manner as provided in section 6103(b)(2) of the Code. However, "Federal Return Information" does not include that information in the hands of the State which it obtained by means wholly from sources independent

from the IRS.

2.9 State Return. The term "State Return" means any tax or information return, declaration of estimated tax, or claim for refund required by or provided for or permitted under the provisions of the internal revenue laws, or related statutes, of the State, and any amendment or supplemented thereto, including supporting schedules, attachments, or lists which are supplemental to or part of, the return so filed.

2.10 State Return Information. The term "State Return Information" means a taxpayer's identity, the nature, source, or amount of his/her income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's State return was, is being, or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the Agency with respect to a State return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under the internal revenue laws, or related statutes, of the State, for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

2.11 Inspection. The term "Inspection" means any examination of a return or return information.

2.12 Disclosure. The term "Disclosure" means the making known to any person in any manner whatever a return or return information.

2.13 State Tax Administration. The term "State Tax Administration"

(a) means–

(i) the administration, management,

conduct, direction, and supervision of the execution and application of the revenue laws, or related statutes of the State, and

(ii) the development and formulation of State tax policy relating to existing or proposed internal revenue laws, or related statutes, of the State, and

(b) includes assessment, collection, enforcement, litigation, statistical gathering functions under such laws or statutes.

2.14 Code. The term "Code" means the Internal Revenue Code of 1954, as amended.

SECTION 3. Disclosure of Federal Returns and Federal Return Information.

3.1 Pursuant to the laws of the State, the Agency is charged with the responsibility for the administration of State taxes imposed on

Limited Sales, Excise, and Use Tax. (Chapter 151)
Taxes on Sale, Rental, and Use of Motor Vehicles. (Chapter 152)
Motor Fuel Taxes. (Chapter 153)
Cigarette Tax. (Chapter 154)
Cigars and Tobacco Products Tax. (Chapter 155)
Hotel Occupancy Tax. (Chapter 156)
Interstate Motor Carrier Sales and Use Tax. (Chapter 157)
Manufactured Housing Sales and Use Tax. (Chapter 158)
Franchise Tax. (Chapter 171)
Cement Production Tax. (Chapter 181)

Miscellaneous Gross Receipts Taxes. (Chapter 182)
Miscellaneous Occupation Taxes. (Chapter 191)
Gas Production Tax. (Chapter 201)
Oil Production Tax. (Chapter 202)
Sulphur Production Tax. (Chapter 203)
Inheritance Taxes. (Chapter 211)
(Texas Tax Code)

Federal returns and Federal return information (whether originals, paper copy, photocopy, microfilm, magnetic media, or any other form) received from IRS will be used for the purpose of, and only to the extent necessary in, State tax administration.

3.2 This agreement constitutes the requisite authorization pursuant to section 6103(d)(1) of the Code for IRS to disclose to, and permit inspection by, an Agency Representative of Federal returns and Federal return information relating to taxes imposed by

Chapter 1 - Normal Taxes and Surtaxes
Chapter 11 - Estate Tax
Chapter 31 - Special Fuels
Chapter 32 - Manufacturers Excise Tax
Chapter 36(d) - Miscellaneous Excise Tax
Chapter 45 - Windfall Profit Tax on Crude Oil

of the Code.

*3.3 Upon the occurrence of any change in employment, duties, or other relevant matters affecting an Agency Representative's right of access to Federal returns and Federal return information or status as Agency Representative, the head of the Agency shall promptly advise in writing the District Director(s) at Austin, Texas; Dallas, Texas; Houston, Texas, and the Service Center Director at Austin, Texas, that such individual is no longer an Agency Representative.

3.4 An Agency Representative to whom a Federal return or Federal return information has been disclosed, may thereafter disclose such return or return information;

(a) to another employee of the Agency for the purpose of and only to the extent necessary in the administration of the State tax laws for which the Agency is responsible;

(b) to a person described in section 6103(n) of the Code or to any officer or employee of such person, solely for the purpose of State tax administration and in a manner consistent with applicable regulation, published rules or procedures, or written communications;

(c) to a legal representative of the Agency personally and directly engaged in, and solely for use in, preparation for a civil or criminal proceeding (or investigation which may result in a proceeding) before a State administrative body, grand Jury, or court in a matter involving State tax administration, if the returns and return information satisfy one or more of the criteria established in section 6103(h)(2)(A), (B), (C).

(d) to an officer or employee of the State audit agency for the purpose of and only to the extent necessary in making an audit of the State tax agency.

3.5 A Federal return or Federal return information may be disclosed in a judicial or administrative proceeding pertaining to State tax administration, but only if the same criteria established in section 6103(h)(4)(A), (B), or (C) are met.

3.6 Notwithstanding any other provision of this section, IRS will not disclose a Federal return or Federal return information

under this section if such disclosure would identify a confidential informant or seriously impair a Federal civil or criminal tax investigation. The Agency agrees that neither it nor its legal representatives will make any further use of disclosure of a Federal return or Federal return information disclosed to an Agency Representative by IRS if IRS notifies the head of the Agency in writing that such further use or disclosure would identify a confidential informant or seriously impair a Federal civil or criminal tax investigation. The Agency further agrees that prior to the disclosure of any Federal return or Federal return information in a State judicial proceeding or to any party other than the taxpayer or his/her designee in a State administrative proceeding as provided by paragraph 3.5 of this agreement, the head or legal representative of the Agency will notify in writing the Service Center or District Director, from whom the return or return information was received, of the intention to make such disclosure. No officer, employee or legal representative shall so disclose a Federal return or Federal return information in such State judicial or administrative proceeding if the Service Center or District Director or other IRS official, within 30 days following receipt of such written notice, informs the head or legal representative of the Agency that such disclosure would identify a confidential informant or seriously impair a Federal civil or criminal tax investigation.

3.7 Additionally, the Agency agrees that it will notify the IRS when, during an audit of the Agency by the State Audit Agency, Federal returns and Federal return information are disclosed to the State Audit Agency and such information is made part of the State Audit Agency's workpapers.

SECTION 4. Disclosure of State Returns and Return Information

4.1 This agreement constitutes the requisite authorization for the Agency to disclose to, and permit inspection by, IRS Representatives of State returns and State return information for the purpose of, and only to the extent necessary in the administration of the internal revenue laws, or related statutes, of the United States.

Any State returns and State return information so disclosed to, or inspected by, an IRS Representative become, in the hands of IRS, "taxpayer return information" as defined by section 6103(b)(3) of the Code and may be redisclosed by IRS only to such persons, for such purposes, and under such conditions as may be prescribed by the Code.

4.2 Nothing in this agreement shall be construed as authority for the Agency to disclose State returns and State return information where such disclosure would be contrary to State law.

*4.3 Upon the occurrence of any change in employment duties, or other relevant matters affecting an IRS representative's right of access to State returns and State return information or status as an IRS Representative, the District Director(s) at Austin, Texas; Dallas, Texas; and Houston, Texas, and the Service Center Director at Austin, Texas, shall promptly advise the Agency in writing that such individual is no longer an IRS Representative.

SECTION 5. Other Cooperative Activities

*5.1 Subject to the restrictions and other provisions of this agreement and the availability of enforcement resources, the Agency and IRS will develop cooperative return selection and examination programs with the objective of avoiding unnecessary duplication of Federal and Stare audit coverage.

*5.2 Information other than Federal or State returns and return information, which the Agency and IRS may deem to be relevant or useful to the administration of State and Federal tax laws, may be exchanged pursuant to arrangements made by the Agency and IRS.

*5.3 In addition to the exchange of tax and other information, the Agency and IRS will, to the extent feasible, extend to each other assistance in other tax administration matters. This may include such, activities as taxpayer assistance, stocking tax forms for

the public, training of personnel, special statistical studies and compilations of data, development and improvement of tax administration systems and procedures and such other activities as may improve tax administration.

SECTION 6. Safeguards and Other Requirements

6.1 As an express condition for the inspection and disclosure of Federal returns and Federal return information, the Agency agrees to comply with the safeguards and requirements prescribed by section 6103(p)(4) of the Code and any implementation of such safeguards and requirements as may be provided by regulations and published procedures including:

(a) furnishing an annual report to the IRS describing the procedures established and utilized by the agency for ensuring the confidentiality of such returns and return information;

(b) permitting IRS to review the extent to which the Agency is complying with the requirements of this paragraph; and

(c) informing in writing all Agency Representatives and other persons to or by whom disclosure or inspection of Federal returns or Federal return information is authorized of the criminal penalties arid civil liability provided by sections 7213 and 7431 of the Code for a disclosure of such returns l and return information which is unauthorized by the Code.

6.2 To the extent consistent with Federal law IRS will accord State returns and State return information confidentiality safequards comparable to those required of the Agency pursuant to this agreement.

6.3 Processing of Federal returns and Federal return information received by the Agency from IRS in the form of microfilms, photo-impressions, magnetic media or other format (including reformatting or reproduction, or conversion to magnetic media, notch cards, or hard copy printout) and transmission and storage of such Federal returns or Federal return information by or on behalf of the Agency may be performed by either Agency owned and/or operated computer facilities, or State shared facilities, or by any other person described in section 6103(n) of the Code. In those cases where such facilities used by the State Agency are shared with other State agencies or operated by any other person described by section 6103(n) of the Code, the Agency will ensure the confidentiality of the Federal returns and Federal return information provided to such shared facility or person. As part of this responsibility the terms of any contract or agreement between the Agency and a shared computer facility or other person to whom Federal return or Federal return information is or may be disclosed for a purpose described in this subsection, will provide, or will be amended to provide, that such person, and officers and employees of the person, will comply with the applicable safeguard conditions contained in regulations, published rules or procedures, or written communications.

6.4 Because some taxpayers may be unaware that agency tax officials are authorized under Federal law to obtain Federal returns and Federal return information for State tax Administration purposes, the Agency will publicize, in a manner satisfactory to IRS, that such returns or return information were obtained pursuant to specific authority granted by the Code. Similar publicity will be provided by IRS, if requested by the Agency, for State tax information furnished IRS pursuant to State law.

SECTION 7. Limitations

7.1 Pursuant to the provisions of section 6103(p)(2) of the Code, and of State law, if any, IRS and the Agency may charge each other a reasonable fee for furnishing returns and return

information under the terms of this agreement. IRS and the Agency may agree not to charge each other for the costs of routine reproduction of returns an-d return information mutually exchanged.

7.2 Under no circumstances will the Agency permit any Federal return or Federal return information to be inspected by, or disclosed to an individual who is the chief executive officer of the State or any person other than one described in section 3 of this agreement.

7.3 Notwithstanding any other provision of this agreement, IRS will not disclose or make known in any manner whatever to any person described in section 3 of this agreement –

(a) any original, copy, abstract of any return, payment, or registration made pursuant to chapter 35 of the Code (relating to taxes on wagering);
(b) any record required for making any such return, payment, or registration made or required pursuant to chapter 35 which IRS is permitted by the taxpayer to examine or which is produced pursuant to section 7602 of the Code (relating to the examination of books and witnesses);
(c) any information obtained by the exploitation of any such return, payment, registration, or record made or required pursuant to chapter 35.

7.4 Notwithstanding any other provision of this agreement, IRS will not disclose or make known in any manner to any person described in section 3 of this agreement information which was obtained pursuant to a tax convention between the United States and a foreign government.

SECTION 8. Officials to Contact for Obtaining Information

8.1 Requests by the Agency for Federal returns or Federal return information should be made to the officials named in the

implementing agreement or to the officials below if an implementing agreement has not been executed.

(a) Requests by the Agency for Federal return information in magnetic media mode should be made to the District Director at (not applicable since covered by implementing agreement) who will be responsible for making the proper arrangements for inspection or copying.

(b) Requests by the head of the Agency or up to two of his/her designees for Federal return, of taxpayers or Federal return information relating to taxpayers showing addresses outside the State should be made to the District Director at (not applicable since covered by implementing agreement).

8.2 Requests by authorized officers and employees of the IRS for inspection or copying of State returns and State return information should be made to the officials named in the implementing agreement supplementing this agreement, or to the (not applicable since covered by implementing agreement) if an implementing agreement has not been executed.

SECTION 9. Termination or Modification of Agreement

9.1 The provisions of the agreement are subject to provisions of the Code, implementing regulations, published procedures, and to the provisions of State statutes and regulations. This agreement may be terminated or modified at the discretion of IRS or the Agency due to changes in Federal or State statutes and regulations or whenever in the administration of Federal or State laws that action seems appropriate.

9.2 Any unauthorized use or disclosure of Federal returns or Federal return info motion furnished pursuant to this agreement or inadequate procedures for safeguarding the confidentiality of such

returns and return information, also constitutes grounds for termination of this agreement and the exchange of information thereunder, subject to the rights of administrative appeal as provided by regulations prescribed by sect-on 6103(p)(/) (sic) of the Code.

9.3 Notwithstanding any other provision of this agreement, no Federal return or Federal return information shall be disclosed after December 31, 1978, by IRS to any person described in section 3 of this agreement if the requirements of section 6103(p)(8) of the Code are not met.

APPROVED:

/s/ Bob Bullock
(Comptroller of Public Accounts)

Signed at Austin, Texas

this 10 day of September 1986.

/s/ Lawrence R. Gibbs
Commissioner of Internal Revenue
Signed at Washington, D.C.

this 15th day of December 1986

IMPLEMENTATION OF THE AGREEMENT ON COORDINATION OF TAX ADMINISTRATION COMPTROLLER OF PUBLIC ACCOUNTS, STATE OF TEXAS-INTERNAL REVENUE SERVICE

I. General Purpose and Objectives

A. Under the Authority of section 6103(d) of the Internal Revenue Code, as amended by the Tax Reform Act of 1976, the Office of the Comptroller, State of Texas (hereafter referred to as Agency), and the Commissioner of Internal Revenue adopted the Agreement on Coordination of Tax Administration. This Agreement has been in full force and effect since December 15, 1986 and supersedes the Agreement entered into on March 25, 1977.

B. In order to facilitate the implementation of the Agreement, the District Director of the Austin District, Internal Revenue Service (hereafter referred to as Director, Austin); the District Director of the Dallas District, Internal Revenue Service (hereinafter referred to as Director, Dallas); the District Director of the Houston District, Internal Revenue Service (hereafter referred to as Director, Houston); the Director, Austin Service Center, Internal Revenue Service (hereafter referred to as Director, AUSC); the Director of the Austin Compliance Center, Internal Revenue Service (hereafter referred to as Director, AUCC); and the Agency consider it mutually beneficial to state the procedures and understandings concerning the exchange of information. The term State, as used in the agreement, will mean the State of Texas. This agreement supersedes the Implementation of Agreement on Coordination of Tax Administration

Comptroller of Public Accounts, State of Texas-Internal Revenue Service signed in May 1980 and amended December 1981.

C. Further, it is the intention of the parties to this agreement that all exchanges under this agreement will be reciprocal in nature to the extent that legal statutes permit.

D. Therefore, in association with the Agreement on Coordination of Tax Administration, the Director, Austin; Director, Dallas; Director, Houston; Director, AUSC; Director, AUCC; and the Agency agree to establish and implement these Guidelines.

II. Federal and State Liaison Officials

The Agency Disclosure Officer and the Austin District Disclosure Officer will be the primary liaison officials for all exchange program matters. In addition, the Dallas District Disclosure Officer; Houston District Disclosure Officer; AUCC District Disclosure Officer; and the Director, Inheritance Tax Division, comptroller of Public Accounts, may be contacted regarding any problems relating to the transmittal of information between our offices.

III. Information to be Exchanged on a Continuing Basis

A. Estate/Inheritance Tax Returns and Reports

1. The Director, AUCC, will provide the Agency with copies of Estate Tax closings letter (Form 627) on a continuing basis.

2. The Director, Austin; Director, Dallas; and Director, Houston will provide the Agency with copies of all Estate tax collateral

examination requests (Form 6229) received by their Estate Tax Groups from Internal Revenue Service District offices outside of Texas.

3. The Director, Austin; Director, Dallas; and Director, Houston will provide monthly to the Agency copies of estate tax attorney. examination reports for estate tax returns. The reports will be forwarded when the tax liability has been agreed.

4. Tolerance and Criteria - Because of the limited scope of the estate tax information automatically exchanged on a continuing basis between the Agency and the Internal Revenue Service, no limiting tolerances and criteria are being established.

B. Excise Tax Returns and Reports - Special Fuel, Diesel and Gasoline

1. The Internal Revenue Service excise tax agents will have access to information maintained by the Agency relating to gasoline, diesel fuel, special motor fuels and noncommercial aviation fuel. Copies of Agency tax returns listed below or specific information contained therein may be furnished to the Director, AUCC, through a tape exchange program or to the Revenue Service upon specific request.

Texas Gasoline Distributor Report (Form 05-100)
Texas Diesel Fuel Supplier or User Report (Form 06-101)

Texas Gasoline or Diesel Fuel-Schedule of Tax Free Sales or Purchases (Form 06-102) Texas Gasoline or Diesel Fuel-Schedule of Tax Free Sales to Permitted Aviation Fuel Dealers (Form 06-103)

2. Tolerance and Criteria - The information concerning Federal excise taxes will be limited by the Internal Revenue Service to that provided for by section 4081 and 4082 of chapter 32 of the Internal Revenue Code and to section 4041 of chapter 31.

C The Agency may transmit to the Director, AUCC, a tape extract reflecting total gross sales and may contain a list of filing discrepancies.

D. The Agency may furnish to the Director, AUCC, a franchise tax tape reflecting active corporations.

E. The Agency may furnish to the Director, Dallas, a list of recently incorporated not-for-profit corporations.

IV. Other Returns and Return Information

A. When the IRS liaison official has a Federal return and/or return information which will not be transmitted to the Agency under other provisions of this agreement but which may be evidence of any intentional or inadvertent understatement or violation of any State tax described in section 3 of the Agreement on Coordination of Tax Administration, the IRS liaison official shall, if the understatement of tax potentially exceeds $1000 or if the understatement or violation is potentially a criminal tax violation, contact the Agency liaison

official and describe the return and/ or return information. If, in the judgement of the Internal Revenue office liaison official, the Agency has a need and use of the return and/or return information, he/she shall provide the Agency liaison official sufficient information, including identifying information, to make a specific request for the return and/or return information as provided by section 8 of the Agreement on Coordination of Tax Administration.

B. The Director, Austin; Director, Dallas; and the Director, Houston will provide the Agency with copies as well as permit physical inspection of audit abstracts, reports, and Federal return information concerning individual taxpayers in response to specific written. requests. Agency requests for access will specify the Agency's need and use for such Federal. return information and will be accompanied or incorporated into a written request for the information signed by the Comptroller, Chief Clerk or designated agency disclosure officer. Access will be denied without the presentation of such signed authorization. The Disclosure Officers of the Austin and/or Dallas and/or Houston Districts will coordinate with the Agency Disclosure Officer the exchange of Federal return information and State return information in civil and criminal cases involving simultaneous investigations of the same taxpayer by the Agency and the Internal Revenue Service.

C. The Agency will provide the Austin and/or Dallas and/or Houston Districts and/or Austin Service Center and/or Austin Compliance Center of the Internal Revenue Service with copies of State tax returns and State return information on specific

taxpayers in response to written requests signed by authorized personnel.

D. This agreement permits the Director, Austin; Director, Dallas Director, Houston; Director, AUSC; Director, AUCC or the Agency to institute projects and activities involving the exchange of Federal and State return information on groups or categories of taxpayers. These projects and activities are intended to identify or resolve tax compliance problems. The Austin-District Disclosure Officer and the Agency Disclosure Officer will coordinate such projects to determine the most expeditious method of handling the proposed exchange. Among the criteria that will be considered in determining whether to proceed with the proposed information exchange will be the impact on the resources of the Agency or the Internal Revenue Service.

E. Requests by the Agency for Federal tax returns or return information relating to taxpayers showing addresses outside the State should be made to the Austin District Disclosure Officer, who will coordinate the processing of the request. The request by the Agency will specify the Agency's need and use for the requested tax information and will be signed by the Comptroller, Chief Clerk or designated agency disclosure office.

F. The Austin District Disclosure Officer and the Agency Disclosure officer will serve as contact points for the notification of intent to disclose information as provided for in section 3.6 of the Agreement on Coordination of Tax Administration.

V. Transmittal Procedures

The following procedures will be used to transmit information between the Internal Revenue Service and the Agency.

A. Estate Tax Closing Letters provided by the Director, AUCC, will be sent by first-class mail monthly to the Agency Disclosure officer. The Directors, Austin, Dallas, and Houston will send as expeditiously as possible by first-class mail to the Agency Disclosure Officer copies of estate tax collateral examination requests received from estate tax groups from Internal Revenue Service District offices outside of Texas.

B. Copies of Federal tax returns and/or return information provided by Dallas, Austin, and Houston District Directors in response to specific Agency requests will be sent by first-class mail to the Agency Disclosure Officer.

C. For control purposes, a special post office box has been designated as the Agency delivery point for Internal Revenue Service documents provided under this agreement.

1. All mail containing tax return or related return information is to be addressed as follows:

(Personal name of Agency Disclosure Officer)
P.O. Box 13312
Capitol Station
Austin, Texas 78711

2. The followings notations or information should not appear anywhere on the outside

of the envelope or mail pouch.

(a) Comptroller's Office

(b) Any division name

(c) Any person's title

D. Internal Revenue Service Form 3210, Document Transmittal will be transmitted with each box, pouch, or envelope. The Agency recipient will sign and date one copy of this form and return it to the sender in order to verify receipt of the shipment.

E. Copies of State tax returns and/or return information provided by the Agency in response to a specific request will be sent by first- class mail to the appropriate District Disclosure Officer in Dallas, Austin, Houston or AUCC. The designated address is as follows:

IRS Austin District
Disclosure Officer
P.O. Box 11448, Mail Stop 7000AUS
Austin, Texas 78767

IRS Dallas District
Disclosure Officer
1100 Commerce, Mail Stop 7000DAL
Dallas, Texas 75242

IRS Houston District
Disclosure Officer
3223 Briarpark, Mail Stop 7000H-BP
Houston, Texas 77042

IRS Austin Compliance Center

Disclosure Officer
P.O. Box 2986, Mail Stop 7000AUCC
Austin, Texas 78769

All mail containing tape or tape extract data will be shipped to:

IRS Austin Compliance Center
Disclosure Officer
P.O. Box 2986, Stop 7000AUCC
Austin, Texas 78769

The recipient will acknowledge receipt of all information.

F. The Agency will furnish written certification of destruction of tax data received from Internal Revenue Service under this agreement to Director, AUCC, when the Agency no longer has need for the information.

VI. Annual Meeting Between State and Internal Revenue Service Personnel

The liaison officials will meet annually approximately one month after the Agency submits to the Director, Austin, its annual safe-guard activity report in June. The meeting will be held on State premises and will be attended by the Director, Austin; Director, Dallas; Director, Houston; Director, AUSC; Director, AUCC; and the Comptroller of Public Accounts, or their authorized designees. Because of their unique knowledge of the information being exchanged, the District Disclosure Officers of the Austin, Dallas, and Houston Districts, the Austin Compliance Center, and the Agency will attend this meeting. The purpose of the meeting will be to review the success of existing exchange programs, examine the need for and use of data being exchanged on a continuing basis, and determine whether or not the

provisions of this agreement require amendment. Additional meetings between other Internal Revenue Service personnel may be arranged as necessary by contacting the appropriate District Disclosure Office.

VII. Annual Review of Authorized List of Employees

The Directors and the Agency mutually agree to review their respective list of employees authorized to request and receive Federal or State tax returns and return information, and to promptly inform the other party of any additions or deletions to such lists. By January 31 of each year, subsequent to the execution of this agreement, each party will submit to the other a current list of those employees designated to sign requests and/or receive returns and return information.

VIII. Reproduction Costs

No charges will be made for costs incurred in reproducing the documents exchanged, except in the case of magnetic tape or tape extracts.

IX. Safeguard Requirements

As an express condition for the inspection and disclosure of Federal returns and/or return information pursuant to this agreement, the Agency agrees to comply with the safeguards and requirements prescribed by section 6103(p) of the Internal Revenue Code. In recognition of their responsibilities under the agreement, each party to the agreement shall, when requested by the other party, review with the other party its safeguard measures for protecting the confidentiality of returns and return information. The Austin District Disclosure Officer and the Agency Disclosure Officer will represent their respective organizations for the purpose of such reviews.

X. AGENCY LIMITATION

The Agency may refuse to furnish information disclosed in the report of any investigation while such investigation is still in progress or during such time as litigation is contemplated or in progress, if the Agency deems it in the best interest of the State for information to be withheld pending final determination of the litigation.

APPROVED:

COMPTROLLER OF PUBLIC ACCOUNTS
INTERNAL REVENUE SERVICE

Bob Bullock
Comptroller of Public Accounts
Signed at Austin, Texas
This 26 day of May 1987

Gary O. Booth
Director, Austin District
Signed at Austin
This 4th day of June 1987

Glen Cagle
Director, Dallas District
Signed at Dallas
This the 18th day of June 1987

Arturo A. Jacobs
Director, Houston District
Signed at Houston
This 30th day of June 1987

Larry G. Westfall
Director, Austin Service Center
Signed at Austin
This 8th day of July 1987

William E. Palzkill
Director, Austin Compliance
Center
Signed at Austin
This 7th day of July 1987

MEMORANDUM OF INTERVIEW
OR ACTIVITY

January 25, 1991

Activity or Interview of:
JUDY DAILY
DISCLOSURE OFFICER
HOUSTON DISTRICT

Conducted by:
SPECIAL INVESTIGATOR
JACK FUTCH

Location of Interview:
OFFICE OF REGIONAL
INSPECTOR, HOUSTON,
TEXAS

Subject Matter/Remarks

DAILY stated in June 1988, IRS CID Special Agent MARK HUGHES, while conducting an administrative criminal investigation of ALVY MCQUEEN obtained a search warrant and seized voluminous records from MCQUEEN, in Grand Junction, Colorado. DAILY said soon afterwards, the investigation became a matter before the Federal Grand Jury.

DAILY said in September 1988, Agents of the Comptroller of Public Accounts of the State of Texas, were authorized to review and obtain copies of the seized records. DAILY said it was her understanding the State Agents were conducting a civil audit of MCQUEEN.

DAILY stated that based on her understanding of the ensuing events, the Comptroller's office subsequently assessed MCQUEEN a sizable tax liability for unpaid fuel excise taxes, and seized MCQUEEN's assets. During civil litigation filed against the State of Texas, MCQUEEN's attorney JOHN TOWNSEND, found out in State Court the IRS had made available to the State the records seized in Grand Junction, Colorado. DAILY said since then TOWNSEND has filed numerous requests for information pertaining to the release under the

Freedom of Information Act.

DAILY stated in addition, TOWNSEND has alleged the release was not only a violation of the Internal Revenue Code, but because the administrative case had been converted to a Federal Grand Jury investigation before the release to the State in September, 1988, there is the possibility of a violation of Rule 6(e) of the Federal Rules of Criminal Procedure. DAILY stated the matter has been before the Federal Courts, and has been found in the favor of the government. DAILY said the litigation was successful because of legal precedents.

DAILY stated her office, as well as the District Director, were not aware of the disclosure until after the fact. She said that SUSIE WONG informed her of the disclosure, and had subsequently prepared a memorandum of how the disclosure took place. DAILY stated both MARK HUGHES and WONG told her that they made the disclosure to the State after discussing the matter with Assistant United States Attorney NANCY PECHT, the assisting attorney in the MCQUEEN Federal Grand Jury investigation.

[REDACTED PARAGRAPH OF ABOUT 3-4 LINES]

DAILY stated, in her professional opinion, the IRS should have not released any information to the Office of State Comptroller's Office, State of Texas. DAILY said the request should have made through her office, and the authorized release would have been made through the terms of the agreement the IRS has with the State of Texas.

DAILY further stated in March, 1988, she provided disclosure training during Criminal Investigation Division's Continued Education Program (CPE). DAILY said the training should have included Special Agents, but can not say for certain if HUGHES and WONG were in attendance.

DAILY stated that she and CID Group Manager ESTHER DARNELL and Special Agent MARK HUGHES met on or about July 26, 1990, for the purpose of making a decision pertaining to what documents would be released to MCQUEEN's attorney per his Freedom of Information

Act Request.
DAILY stated she glanced at certain documents but did not read them in detail, and therefore does not know if the CID investigation of MCQUEEN originated from a referral from Examination Division or the result of a Federal Grand Jury.

Copies of the Revised Basic Agreement on Coordination of Tax Administration, Special Agent SUSAN WONG's memorandum dated January 26, 1990, Houston District Examination Division Referral regarding Livingston Oil Company, Criminal Investigation Division Information Item regarding ALVY MCQUEEN D/B/A Livingston Oil Company, and the Criminal Investigation Case/Project Report, Form 4930, and Case Analysis Guide regarding the MCQUEEN investigation, provided by DAILY on November 26, 1990, are attached to this report.

HUGHES, Mark
6-0690-0033

JUL 25 1991

Mr. Lawrence Finder
First Assistant United States Attorney
United States Attorney's Office
United States Department of Justice
515 Rusk Street
Houston, Texas

Re: Possible criminal violations under Title 26, USC 6103 and 7213 IRC, and, Rule 6 (E), Federal Rules of Criminal Procedures by Assistant United States Attorney and Internal Revenue Service Special Agents.

Dear Mr. Finder:

On June 20, 1991, Internal Revenue Service (IRS) Internal Security (IS) Division Group Manager Harry F. Norman, Jr. and Special Investigator Jack Futch met with you and Assistant United States Attorney Donald DeGabrielle. As you were informed, our Houston IRS Internal Security Division office is presently conducting an investigation to determine if Special Agents Suzy Wong and Mark Hughes of the Internal Revenue Service Criminal Investigation Division, at the direction of former Assistant United States Attorney Nancy Pecht, United States Attorney's Office, Southern District of Texas, made mass unauthorized disclosures of tax-related documents to agents of the Comptroller of Public Accounts of the State of Texas. The documents relate to Mr. Alvy T. McQueen, doing business as Livingston Oil Company, and concerns Federal motor fuel excise taxes.

Mr. Queen's, attorney, Mr. John Townsend, of Houston, Texas, has alleged the disclosures may have violated Title 26, USC 6103, USC 7213, and grand jury secrecy requirements of Rule 6 (E) Federal Rules of Criminal Procedures.

Our investigation, to date, has revealed that Special Agents Hughes

and Wong did, in fact, make unauthorized disclosures to the Comptroller of Public Accounts of the State of Texas. This determination has been made as a result of interviews with Internal Revenue Service officials and Comptroller of Public Accounts officials and employees. It has not been determined at this time whether there have been violations of grand jury secrecy requirements of Rule 6(E).

Retyped Dallas 7/25/91

Code	Initiator Futch	Reviewer Norman	Reviewer Sullivan	Reviewer Dietz
Surname	7/22/91	7/23/91	S	
Date			7/21/91	

In order for our Houston office to continue its internal investigation, it is essential to our investigation to be added to the 6(E) list pertaining to the McQueen investigation conducted by the Houston District Criminal Investigation Division. This aspect of the investigation will be to determine if Attorney Townsend's allegations are valid regarding possible violations of Rule 6(e), involving Special Agents Hughes and Wong.

If any additional information is needed by your office, please contact Special Investigator Jack Futch at telephone number (713) 953-6233.

Sincerely,

(Signed) John H. Dietz
John H. Dietz
Assistant Regional Inspector
(Internal Security)

DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C 20224

FEB 8, 1992

CHIEF INSPECTOR

The Honorable Robert S. Mueller, III
Assistant Attorney General
Criminal Division
Department of Justice
Washington, DC 20530

Attention: Gerald E. McDowell
Chief, Public Integrity Section

Re: Possible criminal Violations Under Title 26 USC 6103 and 7213 and Rule 6(E) Fed. R. Crim. P. by Assistant United States Attorney and Internal Revenue Service Special Agents

Dear Mr. Mueller:

By letter dated July 21, 1991, from John H. Dietz, Assistant Regional Inspector, Internal Security, to Mr. Lawrence Finder, First Assistant United States Attorney, Houston, Texas, the Internal Security function requested assistance in connection with the matter captioned above. That letter states in part that "Our investigation to date, has revealed that Special Agents Hughes and Wong did, in fact, make unauthorized disclosures to the Comptroller of Public Accounts of the State of Texas."

Under applicable Internal Revenue Manual procedures and practices of the Service's inspection function, the Office of the Assistant Chief Counsel (Disclosure Litigation) within the Office of the Chief Counsel, Internal Revenue Service, is responsible for

providing legal assistance and guidance to the Inspection function regarding the civil and criminal provisions of the Internal Revenue Code dealing with disclosure of tax returns and tax return information, e.g., I.R.C. §§ 6103, 7213 and 7431. That office has recently completed a review of records and information compiled by the Inspection function which formed the basis for the above quoted conclusion by Assistant Regional Inspector Dietz. Based on that review, the Office of Assistant Chief Counsel (Disclosure Litigation) has concluded that the factual record did not support a conclusion that Agents Wong and Hughes "willfully disclosed tax information" to representatives of the State of Texas Comptroller's Office in violation of section 7213. While that office advises that the records secured by search warrant return information as that term is defined in I.R.C. § 6103(b)(2), that interpretation has never been squarely addressed by the courts. Furthermore, and in any event, the agents' reasonable reliance on the advice and counsel of the Assistant United States Attorney would vitiate a conclusion that they acted willfully in disclosing return information to the representatives of the Office of the State of Texas Comptroller.

Since the issue of possible violation of Fed. R. Crim. P. 6(E) has previously been disposed of by the courts in McQueen v. Bullock, 907 F.2d 1544 (5th Cir. 1990) at 1551, cert. denied, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-904) and, along with the I.R.C.§ 6103 issue, is currently before the court in Alvy T. McQueen v. United States, et al., Civil Action No. H-91-0329 (S.D. Texas, filed Feb. 12, 1991), we hereby withdraw our request for your office's assistance in this matter and are suspending any further action at this time pending the outcome of the civil damage litigation.

Should any facts develop during the course of the present civil proceeding, Alvy T. McQueen v. United States, et al., which have a bearing on the matters discussed herein we, in conjunction with the Assistant Chief Counsel (Disclosure Litigation), will consider those facts at that time.

Sincerely,

Teddy R. Kern